

**CARLSBAD MUNICIPAL WATER DISTRICT – AGENDA BILL**

|              |         |   |                   |  |
|--------------|---------|---|-------------------|--|
| <b>AB#</b>   | 719     | APPROVE AMENDED & RESTATED WATER<br>PURCHASE AGREEMENT WITH POSEIDON<br>RESOURCES | <b>DEPT. HEAD</b> |  |
| <b>MTG.</b>  | 5/11/10 |   | <b>CITY ATTY.</b> |  |
| <b>DEPT.</b> | UTIL.   |   | <b>CITY MGR.</b>  |  |

**RECOMMENDED ACTION:**

Board of Directors of the Carlsbad Municipal Water District (CMWD) Adopt Resolution No. **1397** approving the Amended and Restated Water Purchase Agreement (Amended WPA) with Poseidon Resources (Channelside) LLC.

**ITEM EXPLANATION:**

On September 28, 2004, Carlsbad Municipal Water District (CMWD) entered into a Water Purchase Agreement (WPA) with Poseidon Resources that allows CMWD to satisfy up to 100% of its potable water needs by receiving water from a seawater desalination plant to be constructed on the NRG Power Station property, which is owned by Cabrillo Power I, LLC. Since that date, all parties have worked diligently to bring the proposed plant from plan to reality.

The original WPA was drafted anticipating that certain details related to the final design, financing, construction, and operating plan would be clarified as the project neared construction, and that certain tests, studies, and other work would be completed in the years between the signing of the WPA and project construction.

As the project nears the next critical phase, staff has worked with Poseidon to create a recommended Amended and Restated WPA that recognizes the work that has been completed to date, provides the necessary clarifications, addresses the needs of the lenders providing the financing for the project, and respects the guiding principles adopted by the Board in the very early stages of this project. Those principles defined the Board's goals with respect to Quality, Quantity, Reliability, Price, Economic Benefit, and Risk:

- Quality – the desalinated water delivered to CMWD will meet or exceed all state water standards
- Quantity – CMWD has the right to receive 100% of its water demand from desalinated water and only pay for water delivered - "take if delivered" contract.
- Reliability – Under the existing WPA, CMWD has the right to take desalinated water up to 100% of its demand; however, CMWD has reduced its reliance on desalinated water to 80% to allow additional subscribers (Desal Partners) the ability to receive desalinated water. CMWD has a variable water demand and a lack of storage that created the need to find partners to take desalinated water when CMWD was unable to take its full share. The balance of CMWD's potable water demands will be delivered by SDCWA resulting in an overall reliability of 90% at all times (80% desalinated water plus 10% SDCWA during times of 50% water restrictions by SDCWA).

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Skip Hammann 760-602-2751 [skip.hammann@carlsbadca.gov](mailto:skip.hammann@carlsbadca.gov)

|                                 |                  |                                     |                                   |                          |
|---------------------------------|------------------|-------------------------------------|-----------------------------------|--------------------------|
| <b>FOR CITY CLERKS USE ONLY</b> |                  |                                     |                                   |                          |
| <b>BOARD ACTION:</b>            | <b>APPROVED</b>  | <input checked="" type="checkbox"/> | <b>CONTINUED TO DATE SPECIFIC</b> | <input type="checkbox"/> |
|                                 | <b>DENIED</b>    | <input type="checkbox"/>            | <b>CONTINUED TO DATE UNKNOWN</b>  | <input type="checkbox"/> |
|                                 | <b>CONTINUED</b> | <input type="checkbox"/>            | <b>RETURNED TO STAFF</b>          | <input type="checkbox"/> |
|                                 | <b>WITHDRAWN</b> | <input type="checkbox"/>            | <b>OTHER – SEE MINUTES</b>        | <input type="checkbox"/> |
|                                 | <b>AMENDED</b>   | <input type="checkbox"/>            |                                   |                          |

- Price – CMWD will never pay Poseidon more than it would have otherwise paid to SDCWA for an equal volume of water.
- Economic Benefits – These benefits have been previously defined in the Amended and Restated Development Agreement (DA 05-01(A), between Poseidon and the City of Carlsbad approved as Ordinance No. CS-059, on September 22, 2009 and are not affected by this action.
- Risk – Poseidon and others assume the risk of construction, operations, and financing to deliver desalinated water to CMWD delivery points. It is recommended that this principal change, somewhat, and is discussed in more detail below.

There are a number of changes pursuant to the staff recommended Restated and Amended WPA. The following is a brief description of the primary recommended revisions:

1. Financial Risk – The recommended Amended and Restated WPA confirms that CMWD has applied for and expects to receive a financial incentive from SDCWA to offset the cost of desalinated water. This financial incentive could provide up to \$200 per acre-foot of desalinated water used by CMWD. Because this financial incentive is of significant importance to the financial success of the project, Poseidon has been concerned that the loss of the incentive could create a financial problem for the project. Although it is clear that CMWD is not interested in offering a full guarantee that the incentive will always be available, staff is recommending that CMWD assume responsibility for the payment of the financial incentive in the event it is reduced or terminated by SDCWA solely due to an action or inaction on the part of CMWD.
2. Similarly, the recommended Amended and Restated WPA confirms that SDCWA, on behalf of CMWD and the other Desal Partners, applied for and received a financial incentive from MWD to offset the cost of desalinated water. This MWD incentive could provide up to \$250 per acre-foot of desalinated water produced by the plant. Because this MWD financial incentive is of significant importance to the financial success of the project, Poseidon has been concerned that the loss of the MWD incentive could create a financial problem for the project. Although it is clear that CMWD is not interested in offering a full guarantee that the MWD incentive will always be available, staff is recommending that CMWD assume responsibility for payment of the financial incentive in the event it is reduced or terminated by MWD solely due to an action or inaction on the part of CMWD.
3. On August 18, 2009, by Resolution No. 1372, the Board approved requiring Poseidon to construct four delivery points for the supply of desalinated water to CMWD (see Exhibit 2). Poseidon now proposes initially to construct only one delivery point as part of the Delivery Facilities. CMWD will retain the right to direct connections (Appurtenant Facilities) as previously approved; these connections will be constructed by Poseidon if requested by CMWD. The option for direct connections is recommended to be deferred until at least 5 years after the start of commercial operations, with the exception of a direct connect from the 54" main to CWMD facilities in Palomar Airport Rd., which could be constructed at any time, if requested by CMWD. Based on the information provided by Poseidon, CMWD staff is recommending that the construction of the Appurtenant Facilities be deferred until some future time.
4. The original WPA required CMWD to purchase desalinated water on a daily basis ranging between a minimum of 10 million gallons per day (MGD) up to a maximum of 25 MGD, resulting in a minimum annual supply of 11,200 acre-feet per year (AFY), and up to 28,000 AFY. The recommended Amended and Restated WPA would: (a) change CMWD's minimum annual purchase to 80% of CMWD's potable water demand which is not a fixed amount and will vary based on actual demand, and (b) reduce CMWD's maximum annual purchase to 25,100 acre-feet per year.

5. CMWD's minimum daily purchase would remain at 10 MGD, but CMWD now would be able to lower the minimum daily purchase to 8 MGD for up to thirty (30) days per Water Year, but in no event more than one hundred twenty-five (125) days in any five (5) consecutive Water Years. This would provide CMWD flexibility in meeting winter-month supply requirements while maintaining water quality in CMWD's pipelines connected to the imported water supply.
6. A provision that would allow Poseidon to store up to 100 million gallons (MG) of Desalinated Water in CMWD's storage reservoirs between November 1 and March 31 of any two consecutive Water Years, subject to available capacity. However, this provision would only become operative upon the reduction or removal of certain regulatory requirements that currently limit the amount of water that may be stored on a daily basis in CMWD's storage reservoirs.
7. The lenders requested the ability to "step-in" for Poseidon in the event of a breach or default by Poseidon. This provides the lender the same rights as Poseidon for a period of time to allow lenders the ability to cure a breach or default to protect their interests as a lender.

#### **ENVIRONMENTAL IMPACT:**

The City of Carlsbad, acting as lead agency for the Project, prepared an Environmental Impact Report (EIR 03-05) in compliance with the California Environmental Quality Act ("CEQA") which the City certified on June 13, 2006. The City of Carlsbad prepared an Addendum to the EIR 03-05 (EIR 03-05(A)) which was adopted on September 15, 2009, and reflects minor and immaterial design modifications to the Project site plan, appurtenant facilities and water delivery pipeline network. The recommended Amended and Restated WPA is within the scope of the previously certified EIR and adopted addendum.

#### **FISCAL IMPACT:**

There is no direct fiscal impact to approving the Amended WPA. CMWD will not at any time pay Poseidon more than CMWD would otherwise have paid to SDCWA for an equal volume of water. However, the Amended WPA with Poseidon outlined above has important fiscal impacts to CMWD. The additional capital cost for construction of the Appurtenant Facilities for direct connections is being deferred to a later date and CMWD assumes some financial risk by agreeing to pay the SDCWA and MWD financial incentives, if CMWD were to take direct action or intentionally would fail to take any action that would diminish Poseidon's ability to receive said incentives.

#### **EXHIBITS:**

1. The CMWD Board Adopt Resolution No. 1397 Approving the Amended and Restated Water Purchase Agreement with Poseidon Resources (Channelside) LLC.
2. Delivery Point Map.
3. Revised and Restated Water Purchase Agreement redlined comparison.
4. Revised and Restated Water Purchase Agreement.
5. Original Water Purchase Agreement dated September 28, 2004.

5/12/10

#### **Exhibit 4 – Revised and Restated Water Purchase Agreement**

THIS DOCUMENT IS CURRENTLY NOT ATTACHED OR INCLUDED WITH THIS AGENDA BILL.

THE AGREEMENT (EXHIBIT NO. 4) WILL BE ATTACHED ONCE IT HAS BEEN FULLY EXECUTED AND RECORDED.

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RESOLUTION NO. 1397

A RESOLUTION OF THE BOARD OF DIRECTORS OF  
CARLSBAD MUNICIPAL WATER DISTRICT (CMWD),  
APPROVING THE AMENDED AND RESTATED WATER  
PURCHASE AGREEMENT WITH POSEIDON RESOURCES  
(CHANNELSIDE) LLC.

WHEREAS, on September 28, 2004, by Resolution No. 1226, the Board approved a Water Purchase Agreement (WPA) between the Carlsbad Municipal Water District (CMWD) and Poseidon Resources (Channelside) LLC (Poseidon) for the purchase of up to 25 MGD of desalinated water from their proposed seawater desalination facility; and

WHEREAS, Poseidon will design and construct the Appurtenant Facilities which include all conveyance facilities, pipeline, pumps, pumping stations and any other infrastructure necessary to deliver the product water to CMWD at the designated delivery points; and

WHEREAS, CMWD and Poseidon desire to amend and restate the terms and conditions for the purchase of desalinated water from Poseidon's project; and

WHEREAS, the Board has determined that the desalinated water supply is consistent with CMWD's 2003 Water Master Plan; and

WHEREAS, the Water Purchase Agreement has been modified eight previous times and the Parties desire to amend and restate the agreement into one document; and

WHEREAS, the City of Carlsbad, acting as lead agency for the Project, in compliance with the California Environmental Quality Act ("CEQA"), prepared an Environmental Impact Report (EIR 03-05) for the Project, which the City of Carlsbad certified on June 13, 2006, and an Addendum to the EIR 03-05 (EIR 03-05(A)), which the City of Carlsbad adopted on September 15, 2009. The proposed revisions to the WPA are within the scope of the previously certified EIR and adopted addendum. As part of its certification and approval of the EIR and the addendum, the City of Carlsbad adopted findings pursuant to CEQA Guideline Sections 15091, 15093, and 15162. The EIR, the addendum and the findings have been made available to and reviewed by the CMWD Board.



1 NOW, THEREFORE, BE IT RESOLVED by the CMWD Board of the City of Carlsbad,  
2 California, as follows:

3 1. That the above recitations are true and correct.

4 2. That CMWD, acting as a responsible agency pursuant to CEQA Guideline  
5 Section 15096, (1) hereby considers the environmental effects of the project as described in the  
6 EIR and addendum certified and approved by the City of Carlsbad pursuant to CEQA Guideline  
7 Section 15096(f), (2) hereby determines that no additional mitigation measures or alternatives,  
8 beyond those mitigation measures adopted by the City of Carlsbad for the project, should be  
9 adopted by CMWD pursuant to CEQA Guideline Section 15096(g), and (3) hereby adopts as its  
10 own separate findings of CMWD as responsible agency pursuant to CEQA Guideline Section  
11 15096(h) the same CEQA findings adopted by the lead agency City of Carlsbad for each  
12 significant effect of the Project as required under CEQA Guideline Section 15091 and 15093, as  
13 if such findings were fully set forth in the body of this Resolution in the name of the CMWD  
Board.

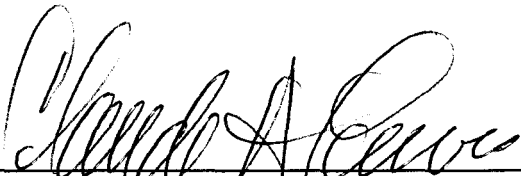
14 3. That the CMWD Board of Directors authorizes the Executive Manager to execute the  
15 Amended and Restated Water Purchase Agreement (the "Amended WPA") for the Carlsbad  
16 Seawater Desalination Project; provided, however, that such authorization is: (a) subject to the  
17 inclusion in the Amended and Restated WPA of: (i) changes approved by the CMWD Board of  
18 Directors, and (ii) such additional terms, conditions, changes or modifications as are approved  
19 by General Counsel to satisfy the purpose and intent of the Amended and Restated WPA; and  
20 (b) further conditioned upon the approval by the San Diego County Water Authority ("SDCWA"),  
21 on terms and conditions acceptable to the General Counsel, of: (i) CMWD's application for a  
22 financial incentive from SDCWA of up to \$200 per acre-foot to offset the cost of desalinated  
23 water; (ii) SDCWA's agreement to assume responsibility for payment of the financial incentive of  
24 up to \$250 per acre-foot to be provided by the Metropolitan Water District of Southern California  
25 ("MWD"), in the event the MWD incentive is reduced or terminated by MWD because of an  
26 action or inaction on the part of SDCWA; and (iii) a satisfactory Local Water Supply Conveyance  
27 and Exchange Agreement, to be entered into by and between CMWD and SDCWA.  
28

1 PASSED, APPROVED AND ADOPTED at a Special Meeting of the Board of  
2 Directors of the Carlsbad Municipal Water District of the City of Carlsbad on the 11th  
3 day of May, 2010, by the following vote to wit:  
4

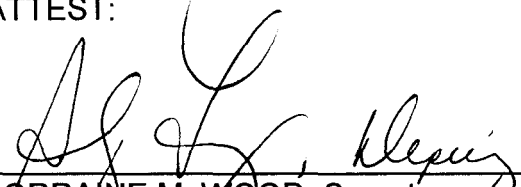
5 AYES: Board Members Lewis, Kulchin, Hall, Packard and Blackburn.

6 NOES: None.

7 ABSENT: None.  
8

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12 CLAUDE A LEWIS, President

13 ATTEST:

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16 LORRAINE M. WOOD, Secretary  
17 (SEAL)



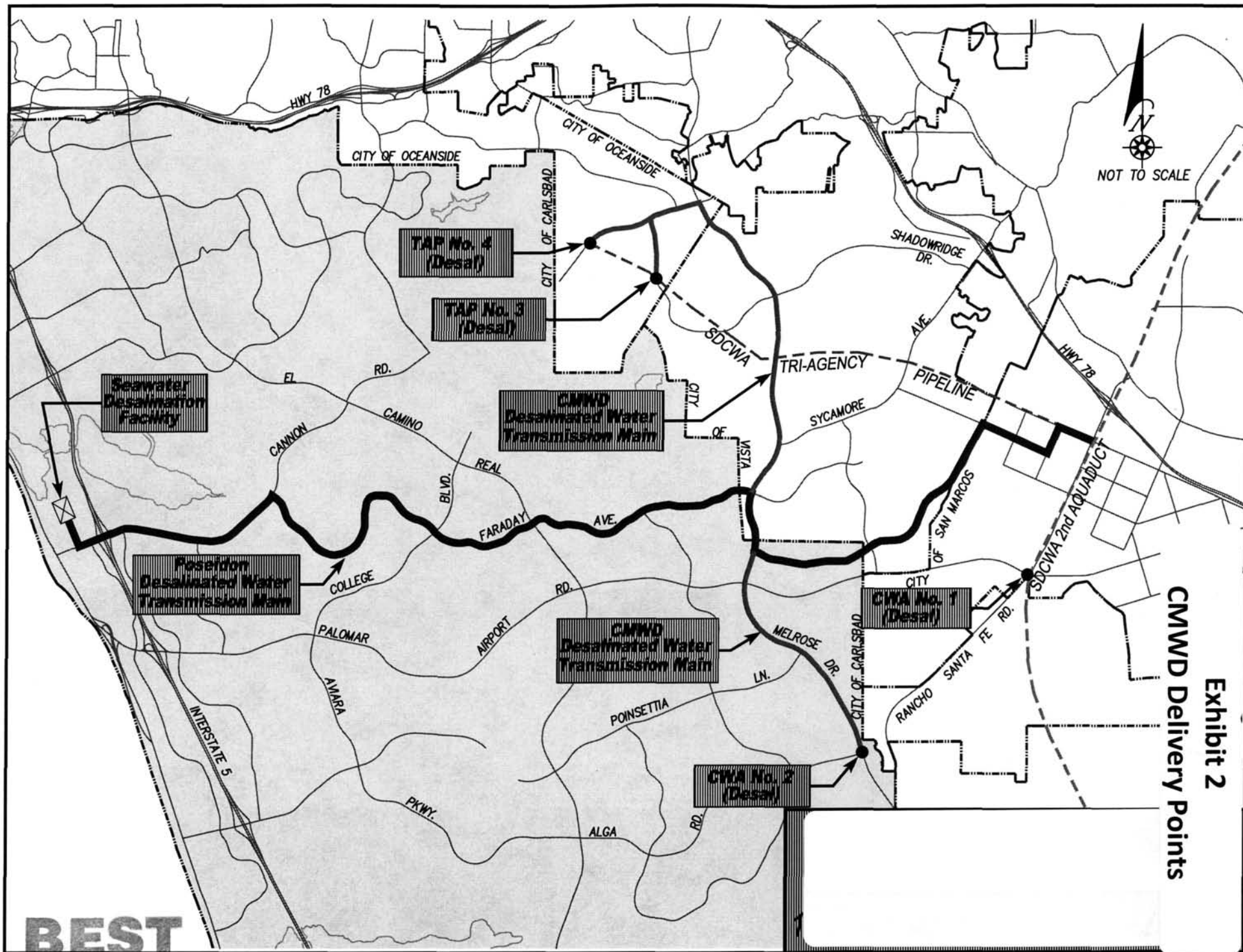


Exhibit 2  
CMWD Delivery Points

BEST  
COPY

DS DRAFT  
May 4, 2010

RECORDING REQUESTED BY  
AND WHEN RECORDED MAIL TO

CARLSBAD MUNICIPAL WATER DISTRICT  
c/o City of Carlsbad  
1200 Carlsbad Village Drive  
Carlsbad, CA 92008  
Attn: City Attorney

Exempt from recording fees pursuant to  
California Government Code Section 27383

**AMENDED AND RESTATED WATER PURCHASE AGREEMENT**

**Entered Into**

**By and Between**

**The Carlsbad Municipal Water District,**

**And**

**Poseidon Resources (Channelside) LLC**

---

**~~September 28, 2004~~**

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## **AMENDED AND RESTATED** **WATER PURCHASE AGREEMENT**

This Amended and Restated Water Purchase Agreement ("Agreement"), entered into as of this 28th \_\_\_\_\_ day of ~~September, 2004~~ 2010 (the "Effective Agreement Date"), is made by and between the Carlsbad Municipal Water District, a municipal water district (the "District" or "Buyer"), and Poseidon Resources (Channelside) LLC, a Delaware limited liability company (~~or any Delaware limited partnership into which it converts~~) ("Poseidon") (the District and Poseidon sometimes hereinafter are referred to collectively as the "Parties" and individually as a "Party"), with respect to the following facts:

### **RECITALS**

A. Based on technical, financial, environmental and engineering studies it has conducted since 1998, Poseidon has determined it is feasible to develop a reverse osmosis seawater desalination plant ~~(the "~~ including the Appurtenant Facilities (as defined herein) (the "Project") capable of delivering up to fifty (50) million gallons per day ("MGD") or 56,000 acre-feet annually, ~~but not less than twenty five (25) MGD or 28,000 acre feet annually,~~ of desalinated water ("Product Water") meeting specified water quality standards.

B. The Project (excluding the Appurtenant Facilities) will be located at a site described on Schedule 1 (the "Site") owned by Cabrillo Power I LLC in the City of Carlsbad (the "City") and leased to Poseidon. The District provides domestic water service to the City.

C. Poseidon and the District previously entered into that certain Water Purchase Agreement, dated September 28, 2004 (the "Effective Date"), as amended, for the purchase of Product Water. The Parties desire to amend and restate the terms of such agreement pursuant to the terms hereof.

D. Poseidon desires to sell to the District, and the District desires to buy from Poseidon, at wholesale, up to ~~twenty five (25) MGD~~ 25,100 acre-feet per year of Product Water (as adjusted pursuant to this Agreement, the "Contract Capacity"), pursuant to an arrangement where the appropriate risks of development, construction and operation of the Project are borne by Poseidon and neither the District nor the City has any liability with respect to the financing of the Project.

~~D~~E. Through the series of contractual rights and obligations contained in this Agreement (including but not limited to the District's right to purchase Product Water from Poseidon, the District's right of first offer described in Section 18 of this Agreement, and the District's right to exercise the options described in Sections 2 and 14.2.2 of this Agreement) the Parties intend to devote the Project and Poseidon's interest in the Site to public use by the District and the City to the extent of the Contract Capacity so that the Project and Site will be "appropriated to public use" pursuant to Cal. Code of Civil Procedure § 1240.660.

~~E~~F. Before the District can commit to purchase any Product Water, the District ~~must~~ first was required to comply, and has complied, with the California Environmental Quality Act

(“CEQA”), compliance with which is a condition precedent to the District’s obligation to purchase Product Water as set forth below.—As part of the City’s environmental analysis under CEQA, an Environmental Impact Report is required to analyze the proposed Project including the contractual agreements with the District that would be included in the Project for the purchase of Product Water from the Project. This Agreement prior to the Approval Date (as defined herein), shall not constitute a “project” subject to CEQA, and nothing in this Agreement prior to the Approval Date shall be construed under Public Resources Code Section 21065 as (a) an activity undertaken by the District or any other public agency, (b) the support of any activity undertaken by a person (including without limitation Poseidon) which is supported in whole or in part by any contract, grant, subsidy, loan or other form of assistance from any public agency, or (c) any issuance to a person (including without limitation Poseidon) of any lease, permit, license, certificate, or other entitlement for use by any public agency.

FG. Subject to the terms and conditions set forth below, Poseidon ~~now~~ desires to amend and restate the terms of the contract with the District, and the District ~~now~~ desires to amend and restate the terms of the contract with Poseidon, for the purchase of Product Water from the Project.

NOW, THEREFORE, in consideration of the foregoing recitals, the mutual covenants and conditions contained herein, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree as follows:

## **OPERATIVE PROVISIONS**

### **1. PURCHASE AND SALE OF CONTRACT CAPACITY.**

**1.1 Contract Capacity.** Subject to all of the terms and conditions of this Agreement, the District hereby agrees to buy the Contract Capacity from Poseidon, and Poseidon hereby agrees to sell the Contract Capacity to the District, to be delivered in installments pursuant to the Delivery Regime ~~to be developed by the Parties pursuant to Section 9.~~

**1.2 District’s Daily Requirements.** Poseidon acknowledges that, by entering into this Agreement, the District intends to purchase from the Project ~~at approximately eighty percent (80%)~~ of its daily requirements for water (up to the Contract Capacity) and that the District currently has variable daily requirements ranging from ten (10) MGD to twenty-five (25) MGD. Accordingly, in light of the District’s variable requirements, the Parties acknowledge ~~and agree that Poseidon shall use commercially reasonable efforts to enter into~~ that Poseidon has entered into supplemental agreements with Oceanside and Olivenhain, and may enter into additional mutually acceptable supplemental agreements with third parties (collectively, the “Supplemental Agreements”) for up to fifteen (15) MGD of the Contract Capacity. Pursuant to such Supplemental Agreements, Poseidon may sell up to fifteen (15) MGD of the Contract Capacity otherwise reserved for the District under this Agreement (the “Supplemental Capacity”) to third parties during periods when the District requires less than twenty-five (25) MGD of Contract Capacity from the Project, and such Supplemental Capacity shall otherwise be available to the extent necessary to satisfy the District’s requirements during days the District requires more than ten (10) MGD of water. Poseidon agrees that: (a) in no event shall Poseidon enter into Supplemental Agreements pursuant to which it agrees to sell more than fifteen (15) MGD out of the Contract



Capacity; and (b) on the terms and conditions set forth in this Agreement, Poseidon shall at all times supply the District with Product Water sufficient to meet its daily requirements up to the Contract Capacity in accordance with the Delivery Regime. Poseidon further agrees that during the Term the Project shall have the capacity to deliver at least twenty-five (25) MGD of Product Water in accordance with the Delivery Regime, and without the District's prior written consent, Poseidon shall not enter into any oral or written agreement, contract, instrument, undertaking or any other kind of understanding whatsoever, which, individually or in the aggregate, shall preclude the District from purchasing the Contract Capacity in accordance with the Delivery Regime. The District shall have the right to review the regimes for the delivery of Product Water to third parties to confirm that such regimes do not adversely affect the District's rights under this Agreement.

**2. TERM.** The term ("Term") of this Agreement ~~shall commence~~ commenced on the Effective Date and shall continue for a period of thirty (30) years ~~(30)~~ after the Commercial Operation Date (defined in Section 4.2 below), unless extended or sooner terminated in accordance with the provisions of this Agreement. The District's obligation to purchase Product Water shall commence if and when the ~~Approval Date (as defined in Section 21.18)~~ shall have occurred, and ~~the~~ conditions set forth in Section 13.2 have been satisfied or waived by the District.

## **2.1 Extension Terms.**

**2.1.1 Extension Option.** ~~The~~ Subject to Section 2.1.6, the District may, at the District's option (the "Extension Option"), elect to extend the Term of this Agreement for two (2) consecutive additional periods of thirty (30) years each (severally called "Extension Term"), subject to all the provisions of this Agreement, provided that the Purchase Price for each Extension Term shall be adjusted as provided in Section 2.1.4(c). Subject to the exercise of an Extension Option becoming effective pursuant to Section 2.1.4(c), an Extension Term shall commence at the expiration of the Term (or the first Extension Term as the case may be) and shall terminate on the thirtieth (30th) anniversary of the date of commencement of that Extension Term, unless sooner terminated as provided herein.

**2.1.2 Failure to Exercise.** If the District fails to exercise the Extension Option for an Extension Term within the time provided in Section 2.1.4(c), then the Extension Option herein granted for such Extension Term shall lapse and be of no further force or effect. Failure to exercise the Extension Option for the first Extension Term shall nullify the Extension Option for the second Extension Term.

**2.1.3 References to "Term."** After the exercise of any Extension Option, all references in this Agreement to the "Term" shall be considered to mean the Term as extended, and all references to termination or to the end of the Term shall be considered to mean the termination or end of the first or second Extension Term, as the case may be.

**2.1.4 Conditions to Exercise.** The District's right to the Extension Option are subject to the following conditions:

(a) **Agreement in Effect.** This Agreement shall be in effect at the time notice of exercise is given and on the last day of the Term (or the first Extension Term, as the case may be).

(b) **No Default.** No District Event of Default shall have occurred and be continuing at the time notice of exercise is given.

(c) **Procedure.** The District may notify Poseidon of its desire to exercise the Extension Option for each Extension Term only by delivering Poseidon written notice of such extension request (each such notice, an "Option Exercise Notice"). The District shall deliver the Option Exercise Notice at least forty-eight (48) months prior to the expiration of the then-current term of the Agreement (the "Existing Term"). Promptly after delivery of the Option Exercise Notice, the Parties shall commence negotiations in good faith on equitable adjustments to the Purchase Price. If the Parties reach agreement on such adjustments no later than twenty-four (24) months prior to the expiration of the Existing Term, the exercise of the Extension Option shall be deemed effective. If the Parties do not reach agreement on such adjustments by twenty-four (24) months prior to the expiration of the Existing Term, the exercise of the Extension Option shall be deemed ineffective and the Agreement will terminate on the last day of the Existing Term (unless otherwise agreed by the Parties).

#### **2.1.5 District Purchase Option**

(a) In the event that the District's exercise of the Extension Option is deemed ineffective pursuant to Section 2.1.4(c), the Parties hereby agree that the District shall have an option (the "Purchase Option") but not the obligation to purchase the Project in accordance with the terms and conditions set forth herein.

(b) **Option Term.** The term of the Purchase Option (the "Purchase Option Term") shall commence on the date that the District's exercise of the Extension Option is deemed ineffective and shall expire twelve (12) months prior to the last day of the Existing Term.

(c) **Exercise of Purchase Option.** The District shall exercise the Purchase Option by delivering to Poseidon written notice (the "Purchase Option Exercise Notice") prior to the expiration of the Purchase Option Term of the District's election to exercise the Purchase Option. Unless and until the District shall deliver the Purchase Option Exercise Notice, the District shall have no obligation to purchase the Project from Poseidon.

(d) **Purchase Option Price.** The purchase price (the "Purchase Option Price") shall be the fair market value of the Project as determined pursuant to this Section 2.1.5(d). The Parties shall have ninety (90) days after Poseidon receives the Purchase Option Exercise Notice in which to agree on the Purchase Option Price. If the Parties are unable to agree on the Purchase Option Price within that period, then within ten (10) days after the expiration of that period each of the District and Poseidon, at its respective cost and by giving notice to the other Party, shall appoint a qualified appraiser to set the Purchase Option Price for the Project. If either Poseidon or the District fails to appoint an appraiser within ten (10) days after the other Party has given notice of the name of its appraiser, the single appraiser appointed shall be the sole appraiser

and shall set the Purchase Option Price ~~of the Project~~. If the two appraisers are appointed by the Parties as set forth in this Section 2.1.5(d), they shall meet promptly and attempt to set the Purchase Option Price ~~of the Project~~. If they are unable to agree on the Purchase Option Price within thirty (30) days after the second appraiser has been appointed, they shall attempt to select a third qualified appraiser within ten (10) days after the last day the two appraisers are given to set the Purchase Option Price. If they are unable to agree on a third appraiser, either of the District or Poseidon, upon ten (10) days notice to the other Party, may apply to the presiding judge of the Superior Court of the State of California, County of San Diego, for the selection of a third, qualified appraiser. The District and Poseidon each shall bear one-half of the cost of appointing the third appraiser and of paying the third appraiser's fee. The third appraiser, however selected, shall be a person who has not previously acted in any capacity for either of the District or Poseidon.

Within thirty (30) days after the selection of the third appraiser, a majority of the appraisers shall set the Purchase Option Price ~~of the Project~~. If a majority of the appraisers are unable to set the Purchase Option Price within the required time period, the three appraisals shall be added together and their total divided by three (3); the resulting quotient shall be the Purchase Option Price ~~of the Project~~. Notwithstanding the foregoing, the low appraisal shall be disregarded if it is more than ten percent (10%) lower than the middle appraisal, and the high appraisal shall be disregarded if it is more than ten percent (10%) higher than the middle appraisal. If only one appraisal is disregarded, then the remaining two (2) appraisals shall be added together and their total divided by two (2); the resulting quotient shall be the Purchase Option Price ~~of the Project~~. If both the low appraisal and the high appraisal are disregarded, the middle appraisal shall be the Purchase Option Price ~~for the Project~~.

After the Purchase Option Price has been set, the appraisers immediately shall notify the Parties. If the District objects to the Purchase Option Price that has been set, the District shall have the right to elect not to purchase the Project, so long as the District pays all the costs in connection with the appraisal procedure that set the Purchase Option Price. The District's election not to purchase the Project must be exercised within ten (10) days after receipt of notice from the appraisers of the Purchase Option Price. If the District does not exercise its election within such ten (10) day period, the District shall purchase the Project from Poseidon as set forth in this Section 2.1.5(d).

**(e) Closing.** The closing date of the purchase of the Project pursuant to the Purchase Option shall be the last day of the Term. The District shall deliver the Purchase Option Price at the closing and at or prior to the closing the Parties shall execute and deliver such other documents as are reasonably necessary to consummate the transfer of the Project.

**2.1.6 Lease Extension.** The Parties agree to use commercially reasonable efforts to obtain the right to extend the term of that certain Second Amended and Restated Ground Lease and Easement Agreement, dated as of April 7, 2010 (the "Cabrillo Lease"), and entered into by and between Poseidon and Cabrillo Power I LLC, to be co-extensive with the Extension Terms available pursuant to Section 2.1.1. If by the date that is three (3) years prior to the expiration date of the initial term of the Cabrillo Lease Poseidon has been unable, during the initial Term of this Agreement, to obtain the right to extend the Cabrillo Lease as described in this Section 2.1.6, then:

(a) the District may negotiate the extension of the Cabrillo Lease as described in this Section 2.1.6 and (b) if necessary, in accordance with the procedures established by law, the matter may be brought before the District Board of Directors to, in its discretion, make the findings necessary to use its power of eminent domain to acquire either: (i) an extension of the Cabrillo Lease as described in this Section 2.1.6 or (ii) the Site and lease the Site to Poseidon on terms consistent with the Cabrillo Lease and the extension thereof described in this Section 2.1.6. Such extension or lease shall be in form and substance reasonably acceptable to the Parties. Poseidon shall pay all costs associated with such acquisition or condemnation proceedings, shall provide such adequate security for such costs as the District may reasonably request, and shall save, indemnify, hold harmless and, if necessary, defend (with counsel acceptable to the District) the District from and against any and all such condemnation costs (including without limitation attorneys' fees and costs) and Losses (as defined in Section 20.1) in accordance with Sections 20.2 and 20.3 hereof. This Section 2.1.6 is not intended by the Parties to impose upon the District a duty to acquire any real property interest or otherwise exercise any power of eminent domain.

**2.2 Water Year, Defined.** As used in this Agreement, "Water Year" means a period of twelve (12) consecutive calendar months, commencing on the first day of January and ending on the last day of December; provided, however that the first Water Year shall commence on the Commercial Operation Date and shall end on December 31, and the last Water Year shall commence on January 1 prior to the date the Term of the Agreement expires or is terminated, whichever applies, and shall end on the last day of the Term of this Agreement or the effective date of any termination, whichever applies.

### **2.3 Termination Prior to the Commercial Operation Date.**

**2.3.1 Certain Events.** ~~In the event that by a date that is twenty four (24) months after the Effective Date (as such date may be extended by mutual agreement of the Parties) (the "Determination Date") any of the following has not occurred, then either Party may terminate this Agreement provided it is not in breach of its obligations hereunder: (i) The Parties acknowledge and agree that: (i) on June 13, 2006, the City certified the Environmental Impact Report for the Project has not been certified under CEQA, (ii) as more particularly set forth in that certain Poseidon Resources Corporation Corrosion Pilot Study, Final Report, dated May 2, 2006 (the "Study"), the Executive Summary of which is attached as Schedule 2.3.1A, Poseidon has not entered into the Supplemental Agreements in accordance with Section 1.2, (iii) the Parties have not completed the development of the System Test pursuant to Section 7.2.1 and the Consumer Plumbing Test pursuant to Section 7.2.2, (iv) the Parties have not determined the and the District has accepted the conclusions of such Study, and (iii) after completion of the study entitled Evaluation of Proposed Irrigation of Water Quality on Carlsbad Landscapes, dated December 2005, the Executive Summary of which is attached as Schedule 2.3.1B, the Parties have determined that the Product Water concentration limits for Boron pursuant to Section 8.3, (v) the Parties have not determined the Interconnection Points pursuant to Section 9.2 (and, if applicable, entered into the Appurtenant Facilities Agreement), (vi) the Parties have not determined the Delivery Regime pursuant to Section 9.3 or (vii) Poseidon has not obtained any required consent of Cabrillo Power LLC to the District's exercise of its rights under Section 14.2.2 are as set forth on Schedule 8.2.~~

**2.3.2 Authority Water Rates; Authority Incentive.** ~~In the event that by the Determination Date Poseidon has reasonably determined~~acknowledges that the water rates charged by the Authority are ~~not~~ sufficient to implement the Project. In the event that by June 30, 2011 (which date may be extended by Poseidon in its sole discretion) the condition set forth in Section 13.1.8 has not been satisfied or waived by Poseidon, then Poseidon may terminate this Agreement.

**2.3.3 Completion of System Test.** ~~In the event that the System Test has not been successfully completed by a date that is twenty four (24) months after the initial commencement of the System Test (as such date may be extended by mutual agreement of the Parties), then either Party may terminate this Agreement.~~ Intentionally Omitted

**2.3.4 Legal Entitlements For Construction.** ~~As more specifically set forth in Section 5, Poseidon shall obtain and maintain all Legal Entitlements with respect to the Project. On or before the fourth (4th) anniversary of the Effective Date (the "Construction Permit Deadline") Poseidon shall obtain (or cause its applicable subcontractors to obtain) The District hereby acknowledges that Poseidon has obtained all Legal Entitlements required for the commencement of construction of the Project. In the event that Poseidon has not obtained such Legal Entitlements by the Construction Permit Deadline, the Parties shall meet to assess the effect of the delay on the implementation of the Project. The Parties shall use commercially reasonable efforts to agree upon an extension of the Construction Permit Deadline. If the Parties cannot agree on such an extension, then either Party may terminate this Agreement. for which the issuing Governmental Authority has discretion in the issuance of such Legal Entitlement (the "Discretionary Legal Entitlements"), subject to the proceedings described on Schedule 2.3.4.~~

### 3. PURCHASE PRICE.

#### 3.1 Purchase Price.

**3.1.1 Initial Purchase Price.** ~~As the purchase price ("Purchase Price") Buyer shall pay to Poseidon for the Contract Capacity, the District shall pay to Poseidon in accordance with Section 3.3 an amount equal to (A) an amount per acre foot equal to the lower of (i) the Avoided Water Cost (as defined in Schedule 3) and (ii) the Base~~ the Purchase Price (as defined below); multiplied by (B) the total number of acre feet actually delivered (or deemed to be delivered pursuant to Section 9.8) to the Delivery Points (defined in Section 9.2); 9.2.1). The "Purchase Price" shall be an amount per acre foot equal to the sum of: (i) the lower of (a) the Avoided Water Cost (as defined in Schedule 3) or (b) the Base Price (as defined below) and (ii) the Non-Administrative Real Estate Charge (as defined in Schedule 3). Subject to Sections 3.2, 9.2 and 10, the initial base price (the "Base Price") shall be the sum of ~~(iA) Eight~~ eight hundred and sixty-one Dollars (\$861) per acre foot (the "Base Charge") and ~~(iiB) the Delivery Charge as determined pursuant to Section 3.2.3.~~

**3.1.2 Subsidies; Incentives.** The Parties shall use commercially reasonable efforts to obtain either (i) a subsidy/financial incentive from the Metropolitan Water District of Southern California ("MWD") under its Seawater Desalination Program in an amount ~~not less than~~ up to Two Hundred Fifty Dollars (\$250.00) per acre foot for the District's purchase of Product

Water under this Agreement or (ii) a form of third party financial support for the District's purchase of Product Water under this Agreement which provides the District with the economic equivalent of ~~not less than~~up to Two Hundred Fifty Dollars (\$250.00) per acre foot for the District's purchase of Product Water under this Agreement (such ~~subsidy~~financial incentive or financial support hereinafter referred to as the "~~Subsidy~~MWD Incentive"). Poseidon shall cooperate with the District in obtaining the ~~Subsidy~~MWD Incentive. The Parties shall use commercially reasonable efforts to obtain a financial incentive from the Authority under its Local Water Supply Development Program in an amount of up to Two Hundred Dollars (\$200.00) per acre foot for Buyer's purchase of Product Water under this Agreement (such financial incentive hereinafter referred to as the "Authority Incentive"). The Parties shall cooperate in obtaining the Authority Incentive. The Parties further agree that the Base Price shall be equitably adjusted to reflect any other ~~subsidies~~financial incentives, grants or external funding, including without limitation funds available under Proposition 50, that shall reduce Poseidon's capital and/or operating and maintenance costs of the Project (the "~~Other Grants or Subsidies~~Financial Incentives"). The Parties shall cooperate with each other in applying for and in obtaining any Other Grants or ~~Subsidies~~Financial Incentives. Poseidon may terminate this Agreement in the event that at any time after (i) the Authority Contribution Agreement has been entered into by the parties thereto and the Authority Incentive available thereunder is reduced or eliminated as a result of an act or omission of a party other than the Parties, or (ii) the MWD Contribution Agreement has been entered into by the parties thereto and the MWD Incentive available thereunder is reduced or eliminated as a result of an act or omission of a party other than the Parties (unless Buyer agrees that the amount by which the MWD Incentive is reduced or eliminated shall continue to be deemed to have been received by Buyer for the purposes of calculating the Avoided Water Cost).

### **3.2 Adjustments to the Base PriceCharge.**

**3.2.1 Schedule 3.** The Base ~~Price~~Charge shall be adjusted as described on Schedule 3.

**3.2.2 Change in Law.** In the event of any change to or the adoption of any Applicable Law after the Effective Date (a "Change in Law") (other than a Change in Law which results in a New City Charge) which would materially and adversely affect the ability of Poseidon to perform any of its material obligations under this Agreement the Base Price shall be equitably adjusted to reflect the costs incurred by Poseidon to comply with such change to or adoption of an Applicable Law.

**3.2.3 ~~Delivery Charge.~~** ~~Within twelve (12) months after the Effective Date, the Parties shall use commercially reasonable efforts to agree upon a mutually acceptable per acre foot charge (the "~~Delivery Charge~~").~~**Delivery Charge.** As used herein, "Delivery Facilities" shall mean, collectively, the Appurtenant Facilities, the Authority Connection Facilities, the Product Water pump station at the Site (the "Pump Station"), surge tank, the Product Water storage facilities at the Site (the "Storage Facilities"), and the Product Water pipeline up to the boundary of the Site and all other equipment, facilities and infrastructure (including but not limited to, as may be required for disinfection and fluoridation of Product Water) between the Pump Station and the boundary of the Site. The charge which~~charge shall reflect~~reflects the cost of construction, financing, operation and maintenance of the ~~Appurtenant~~Delivery Facilities.— (the "Delivery

Charge”) shall be determined pursuant to Section 5 of Schedule 3. The Delivery Charge (as it may be ~~reduced~~adjusted pursuant to Section 9.2) shall be a part of the Base Price as described in Section 3.1.1.

**3.2.4 Payment in Lieu of Taxes.** In the event that, subsequent to a third party acquiring the Project, including Poseidon’s leasehold of the Site, such third party is not obligated to pay property taxes with respect to the Project or a fee in lieu of property taxes pursuant to the Development Agreement, the Base Price will be reduced by an amount equal to the amount of taxes no longer payable.

**3.3 Time and Manner for Payments.** For each month during the Term that deliveries of Product Water are made pursuant to this Agreement (or deemed made pursuant to Section 9.8), Poseidon shall invoice the District for the then-current Purchase Price for Product Water delivered to the Delivery Points in the preceding month and for any Additional Amounts incurred in the preceding month. ~~The~~To the extent that the actual amount of any component of the Purchase Price cannot be accurately determined at the time an invoice for the last month of each Water Year also shall include the amount of any Deferred Payment and/or Additional Payment due from the District pursuant to Schedule 3. Within thirty (30) days of receipt of an invoice from Poseidon, the applicable month is issued, such item shall be billed on a reasonably estimated basis and an additional payment or refund, as applicable, shall be made to reflect the difference between such estimated amount and the actual amount of such component on the next invoice issued after the date on which Poseidon is able to determine the exact amount of such component. If such adjustment is determined after the expiration of the Term (or any Extension Term, if applicable), a final invoice should be issued and any adjustment to amounts previously paid should be made upon the issuance of such final invoice. The District shall remit to Poseidon the amount invoiced within the later of (the “Due Date”): (i) twenty (20) days of receipt of an invoice from Poseidon and (ii) the last day of the month immediately after the month to which the invoice relates. Invoices and payments shall be delivered to Poseidon at the address for notices to Poseidon set forth in Section 21.4 of this Agreement. If Poseidon has not received payment prior to the thirtieth (30<sup>th</sup>) day after the District’s receipt of the corresponding invoice~~Due Date~~, Poseidon may send the District a notice (an “Overdue Notice”) with respect to such invoice. Payments made more than fifteen (15) days after the date of the District’s receipt of an Overdue Notice from Poseidon will bear a late fee/interest charge of one percent (1%) per month (but not to exceed the maximum amount permitted by law) (the “Overdue Rate”), from the ~~thirtieth (30<sup>th</sup>) day after the date of receipt of the invoice~~Due Date. In the event of a dispute over the amount invoiced by Poseidon, the District promptly shall notify Poseidon of any such dispute and will pay any non-disputed amounts. If the Parties are unable to resolve any such disputes, the disputes shall be resolved in accordance with the procedure set forth in Section 20.19. If any disputed amount is adjusted in Poseidon’s favor, the District shall pay to Poseidon the amount of such adjustment, with interest thereon at the Overdue Rate from the date such disputed amount was due until the date of actual payment.

**3.4 Take-if-Delivered Contract.** The Parties acknowledge and agree that this Agreement is a “take-if-delivered” contract for the purchase of Product Water from Poseidon during each year of the Term. Payments made by the District shall be based upon the quantity of water actually delivered (or deemed to be delivered pursuant to Section 9.8) to the Delivery Points

multiplied by the Purchase Price in effect at the time of delivery, calculated in accordance with Sections 3.1 through 3.2 hereof, unless the Parties otherwise agree in writing.

**3.5 Additional Amounts.** In addition to the payment of the Purchase Price, the District shall reimburse Poseidon for the following items (the “Additional Amounts”):

**3.5.1 New City Charges.** All franchise fees, taxes or other monetary charges levied in a discriminatory manner by the City, the District, the RDA or any agency (collectively, the “City Agencies”) of any of the foregoing on Poseidon or the Project, or the cost incurred by Poseidon resulting from any other discriminatory regulatory action by a City Agency (collectively, the “New City Charges”) but only to the extent actually paid or incurred by Poseidon. The Parties intend that, if possible, Poseidon shall pass through any such New City Charge to the District which, in turn, shall pass through any such New City Charge to its ratepayers, and the District shall collect such New City Charge from its ratepayers and shall remit such New City Charge on Poseidon’s behalf to the City, the District or the RDA, whichever applies.

**3.5.2 Additional Insurance.** The cost of the premiums for the Additional Insurance (as described in Section 12).

#### **4. CONSTRUCTION.**

**4.1 Engineering, Procurement and Construction.** Poseidon shall engineer, procure and construct the Project in accordance with: (a) any law, statute, ordinance, rule, code, standard, regulation, requirement, judgment, consent decree, consent order, consent agreement, permit action, determination or order applicable to any activities associated with the designing, building, testing, acceptance, permitting, operation, maintenance, management and ownership of any part of the Project (collectively “Applicable Laws”) and any other obligations of the Parties under this Agreement; and (b) those methods, techniques and standards that, at the time a particular service is performed and in light of the circumstances then known or which reasonably should have been known, are generally accepted for use in the design, construction, operation, maintenance, management and ownership of facilities similar to the Project (collectively “Prudent Industry Practices”). Poseidon shall not commence construction of the portion of the Project which is to provide Product Water to the District until the condition set forth in Section 13.2.6 has been satisfied or waived by the District.

**4.2 Testing.** Prior to the Project having commenced selling Product Water on a continuous basis as contemplated by the Delivery Regime (“Commercial Operation”), the Project shall have completed successfully a performance test (the “Performance Test”) of delivery of Product Water of the quality and quantity provided in this Agreement. The District hereby approves the criteria for the Performance Test shall be developed by Poseidon in accordance with Prudent Industry Practices and approved by the District within thirty (30) days after Poseidon has delivered the criteria to the District set forth on Schedule 4.2 of the Agreement. The criteria for the Performance Test ~~shall be~~ included in Poseidon’s engineering, procurement and construction contract for the Project. The District also shall have an opportunity to be present at, and review the results of, the Performance Test. Poseidon may repeat the Performance Test as often as necessary, provided that it gives the District at least three (3) days notice prior to each Performance Test.



Once the Project has completed the Performance Test successfully, Poseidon may declare that the Project is ready to enter into Commercial Operation and begin delivery of Product Water to the Delivery Points in accordance with Section 9 (the date of Poseidon's declaration is referred to herein as the "Commercial Operation Date").

**5. LEGAL ENTITLEMENTS.** Poseidon, at its sole cost and expense, shall be solely responsible for obtaining and maintaining (or causing its applicable subcontractors to obtain and maintain) any and all permits, licenses, approvals, authorizations, consents and entitlements of whatever kind and however described (collectively, "Legal Entitlements") which are required to be obtained or maintained with respect to the Project or the activities to be performed by Poseidon (or its applicable subcontractors) under this Agreement and which are required to be issued by any ~~federal~~Federal, state, city or regional legislative, executive, judicial or other governmental board, agency, authority, commission, administration, court or other body or any official thereof having jurisdiction with respect to any matter which is subject to this Agreement, ~~including~~. Such legal entitlements obtained by Poseidon as of the Agreement Date include without limitation, legal entitlements received from the California Coastal Commission, the Regional Water Quality Control Board, the City, the Carlsbad Housing and Redevelopment Commission ("RDA") and the District (each, a "Governmental Authority"). The material Discretionary Legal Entitlements obtained by Poseidon as of the Agreement Date are set forth on Schedule 5. Poseidon also shall be solely responsible for compliance with and for all costs and expenses necessary for compliance with CEQA, to enable Poseidon to make Product Water available to the District pursuant to this Agreement, and Poseidon shall be responsible for initiating any procedures required for compliance with CEQA with regard to this Agreement. The City shall be the "lead agency" (as that term is used in CEQA) with respect to the Project and shall include this Agreement as part of the proposed Project which will be subject to environmental review under CEQA.

## **6. PROJECT OPERATION AND MAINTENANCE.**

**6.1 Continuous Operation.** Poseidon shall operate the Project at the level necessary to satisfy Poseidon's obligation to provide the Contract Capacity to the District under this Agreement in accordance with the Delivery Regime.

**6.2 Operations, Maintenance, Management and Repair.** Poseidon, at its sole cost and expense, shall operate, maintain and manage or cause its subcontractors (including plant managers and operators) to operate, maintain and manage the Project in accordance with this Agreement, all Applicable Laws and Prudent Industry Practice. Without limiting the generality of the foregoing, Poseidon shall maintain the Project, including without limitation each material portion thereof, in good mechanical and operating repair and condition, perform maintenance in accordance with all Applicable Laws (whether now in force or hereafter adopted), Prudent Industry Practice and manufacturers' recommendations, ordinary wear and tear excepted. Poseidon shall repair or cause to be repaired the Project, including without limitation each material portion thereof, for damage caused by: (a) acts or omissions over which the District has no control; (b) acts or omissions of Poseidon or its officers, directors, shareholders, principals, agents, servants, employees, or third parties; or (c) Poseidon's failure to perform its obligations under this Agreement or its obligations under any other agreement in any way related to the ownership, use

or operation of the Project. If Poseidon intends to replace its initial operations and maintenance contractor with a contractor not set forth on Schedule 6.2, Buyer shall have the opportunity to comment on such intended replacement and Poseidon shall use commercially reasonable efforts to address any issues raised by Buyer.

**6.3 Operation and Maintenance Manual.** Poseidon shall prepare and amend periodically, in accordance with Prudent Industry Practices, an operation and maintenance manual (the “O&M Manual”) which sets forth the installation, operation, maintenance, record keeping and reporting requirements for each material component of the Project and applicable licensing and qualification requirements for Project personnel. Poseidon shall give the District a reasonable opportunity to review and comment on the O&M Manual prior to its finalization, and shall use reasonable efforts to address any comments made by the District. Prior to the Commercial Operation Date, Poseidon shall deliver to the District five (5) complete copies of the O&M Manual and associated equipment catalogs and manuals. Within five (5) days of adopting any amendments to the O&M Manual, Poseidon also shall deliver to the District five (5) copies of the O&M Manual, as amended.

**6.4 Coordinating Committee.** The Parties agree to establish a coordinating committee comprised of one representative of each of Poseidon and each Water Purchaser (as defined below) within sixty (60) days after Poseidon notifies the Water Purchasers that Poseidon expects the Commercial Operation Date to occur within twelve (12) months. The coordinating committee will meet as often as necessary to coordinate exchange arrangements and communications, address flow changes and daily operations and coordination with the Authority in a manner consistent with this Agreement. The coordinating committee shall be advisory, and shall have no authority to impose any obligations or requirements on any Water Purchaser or Poseidon or make any amendment or changes to any Water Purchase Agreement. Poseidon shall use commercially reasonable efforts to address any issues raised by the coordinating committee. As used herein: (i) “Water Purchasers” shall mean each purchaser of Product Water from Poseidon under an agreement with a term exceeding one (1) year, and as of the Agreement Date, the Water Purchasers are Buyer, Valley Center Municipal Water District, a municipal water district, Rincon del Diablo Municipal Water District, a municipal water district, Sweetwater Authority, a joint powers agency of the City of National City and the South Bay Irrigation District, Rainbow Municipal Water District, a municipal water district, Vallecitos Water District, a County Water District formed under Division 12 of the Water Code (“Vallecitos”), Santa Fe Irrigation District, an irrigation district, Olivenhain Municipal Water District, a municipal water district (“Olivenhain”), and the City of Oceanside (“Oceanside”), and (ii) “Water Purchase Agreements” shall mean the water purchase agreements between Poseidon and the Water Purchasers (including this Agreement).

## 7. DAMAGE TO THE PROJECT, DISTRIBUTION SYSTEM TECHNICAL STUDIES.

**7.1 Damage To the Project.** If during the Term the Project or any material portion thereof is totally or partially destroyed or damaged from any cause whatsoever, Poseidon, at its sole cost and expense, shall make or cause to be made such repairs or replacements as are necessary to restore operation of the Project as soon as possible to the extent necessary to provide the Contract Capacity under Capacity under this Agreement in accordance with the Delivery Regime.

### 7.2 Distribution System Technical Studies.

**7.2.1 System Test.** ~~Within one hundred and eighty (180) days after the Effective Date, the Parties shall complete the development of a mutually acceptable test (the "System Test") of the effect of Product Water on the components of the District's water distribution system (the "Distribution System"). The System Test shall include circulating Product Water, meeting the Water Quality Standards, from Poseidon's pilot desalination facility and the water from the District's current imported water supply, in parallel, through two identical systems of pipes, valves and other components provided by the District which are representative of those contained in the Distribution System (the "System Test Components") for a time period sufficient (as mutually agreed by the Parties, but not to exceed six (6) months except as provided herein) to determine the relative effect of the Product Water on the System Test Components. Prior to the end of the one hundred and eighty (180) day period to complete the development of the System Test, the Corrosion Advisory Panel (as defined in Section 7.2.54) shall meet with both Parties in Carlsbad, become familiar with the project and review and comment, in writing, on the proposed design and proposed length of the System Test. Following the conduct of the System Test, the results of the System Test shall be transmitted to the Corrosion Advisory Panel and the Corrosion Advisory Panel shall provide written comments on the interpretation of the results to both Parties. In the event that the System Test results show that the Product Water has an adverse effect on the integrity of any System Test Component which effect would not also be caused by water from the District's current imported water supply, Poseidon shall take all commercially reasonable actions to change the proposed operation of the Project to remove such adverse effect. The System Test shall be re-performed until the results thereof do not show that the Product Water has such an adverse effect on the integrity of any System Test Component. In the event that the members of the Corrosion Advisory Panel do not agree as to whether the results of the System Test show such an adverse affect on any System Test Component or whether the duration of the System Test is adequate to evaluate such an adverse effect, then the System Test shall be extended by a time period to be mutually agreed by the Parties but not to exceed an additional six (6) months. All costs of performing (and, if necessary, re-performing) the System Test shall be borne by Poseidon; provided, however that the cost of providing System Test Components, imported water and the collection, treatment, and disposal of such imported water in accordance with Applicable Law shall be borne by the District. Poseidon and the District hereby acknowledge and agree that a mutually acceptable test (the "System Test") of the effect of Product Water on the components of the District's water distribution system (the "Distribution System") has been successfully performed.~~

**7.2.2 Consumer Plumbing Test.** ~~Within one hundred and eighty (180) days after the Effective Date, the Parties shall complete the development of a mutually acceptable test~~

~~(the “Consumer Plumbing Test”) of the effect of Product Water on the components of consumer plumbing used in the District’s service area, particularly on the leaching of lead and/or copper from these components. The Consumer Plumbing Test shall include circulating Product Water meeting the Water Quality Standards from Poseidon’s pilot desalination facility and the water from the District’s current imported water supply, in parallel, through two identical systems of consumer plumbing components (the “Consumer Test Components”) for a time period sufficient (as mutually agreed by the Parties, but not to exceed six (6) months, except as provided herein) to determine the relative effect of the Product Water on the Test Components. The pipe loop test described in AWWARF, 1991, *Lead Control Strategies #406*, American Water Works Research Foundation, Denver, CO shall be used as a preliminary model of the Consumer Plumbing Test. Prior to the end of the one hundred and eighty (180) day period to complete the development of the Consumer Plumbing Test, the Corrosion Advisory Panel (as defined in Section 7.2.4) shall meet with both Parties in Carlsbad, become familiar with the project to review and comment in writing on the proposed design and proposed length of the Consumer Plumbing Test. Following the conduct of the Consumer Plumbing Test, the results of the Consumer Plumbing Test shall be transmitted to the Corrosion Advisory Panel and the Corrosion Advisory Panel shall provide written comments on the interpretation of the results to both Parties. In the event that the Consumer Plumbing Test results show that the Product Water has an adverse effect on the integrity of any Consumer Test Component or on the leaching of lead and/or copper from said Consumer Test Component which effect would not also be caused by water from the District’s current imported water supply, Poseidon shall take all commercially reasonable actions to implement changes to the proposed operation of the Project to remove any such adverse impacts. The Consumer Plumbing Test shall be re-performed until the results thereof do not show that the Product Water has such an adverse effect on the integrity of any Consumer Test Component or the leaching of lead and/or copper from any Consumer Test Component. In the event that the members of the Corrosion Advisory Panel do not agree as to whether the results of the Consumer Plumbing Test show an adverse effect on the integrity of any Consumer Test Component or on the leaching of lead and/or copper from any Consumer Test Component or whether the duration of the Consumer Plumbing Test is adequate to evaluate such an adverse effect, then the Consumer Plumbing Test shall be extended by a time period to be mutually agreed by the Parties, but not to exceed six (6) months. All costs of performing (and, if necessary, re-performing) the Consumer Plumbing Test shall be borne by Poseidon; provided, however that the cost of providing Consumer Test Components, imported water and the collection, treatment, and disposal of such imported water in accordance with Applicable Law shall be borne by the District. Poseidon and the District hereby acknowledge and agree that a mutually-acceptable test (the “Consumer Plumbing Test”) of the effect of Product Water on the components of consumer plumbing used in the District’s service area, particularly on the leaching of lead and/or copper from these components has been completed.~~

**7.2.3 System Monitoring Plan.** Within ~~twelve~~(12) months after the ~~Effective Date of the Agreement~~ Date, the Parties shall commence the development of a mutually agreeable method for monitoring the effect of Product Water on the integrity of the Distribution System (the “System Monitoring Plan”). Before the System Monitoring Plan is final, the Corrosion Advisory Panel (as defined in Section 7.2.4) shall have thirty (30) days to review the final draft System Monitoring Plan and provide written comments. The Parties shall complete the development of

the System Monitoring Plan in sufficient time to allow at least one year of data collection prior to the commencement of Commercial Operation, ~~but in no event later than twelve (12) months prior to the Projected Commencement Date.~~ In the event that the District reasonably believes that the Product Water may have an adverse effect on the integrity of all or a material portion of the Distribution System which effect would not also be caused by the District's likely alternative water supply, the Parties shall meet to discuss such potential adverse effects. Poseidon shall take all commercially reasonable actions to implement changes to the operation of the Project to remove such an adverse effect of Product Water on the integrity of all or a material portion of the Distribution System. The cost of the System Monitoring Plan in excess of the cost which would be reasonably incurred by the District to monitor the Distribution System in the absence of the Project shall be equally shared by the Parties up to the first anniversary of the Commercial Operation. Thereafter, any additional system monitoring cost shall be borne by the District. Should Buyer request that Poseidon construct the Carlsbad Delivery Facilities or Additional Facilities, the Parties shall meet and confer on the need for additional system monitoring (the "Additional System Monitoring"). The cost of the Additional System Monitoring in excess of the cost which would be reasonably incurred by the District to monitor the Distribution System in the absence of the construction of the Carlsbad Delivery Facilities or the Additional Facilities shall be equally shared by the Parties up to the first anniversary of the earlier of the Carlsbad Delivery Facilities or the Additional Facilities being placed into operation. Thereafter, any Additional System Monitoring costs shall be borne by the District.

**7.2.4 Corrosion Advisory Panel.** ~~Within ninety (90) days after the Effective Date, the Parties shall retain~~The Parties have previously retained a review panel (the "Corrosion Advisory Panel"), composed of two nationally recognized experts with experience in the design and conduct of tests on the corrosiveness of water to ~~distribution~~ system and consumer plumbing components. Each Party shall have the right to appoint one member of the Corrosion Advisory Panel (as well as such member's replacement). The Corrosion Advisory Panel shall ~~be retained to review the design and length of the System Test and the Consumer Plumbing Test, the interpretation of the results of said tests and~~review the design of the System Monitoring Plan, as more specifically provided in Section 7.2.1 and 7.2.2. The Corrosion Advisory Panel shall meet one time in Carlsbad to become familiar with the project, to review and comment, in writing, on the design and the proposed length of the said tests before the design and length of said tests are finalized. Following the conduct of the said tests, the results of said tests shall be transmitted to the Corrosion Advisory Panel and the Corrosion Advisory Panel shall provide written review comments to the Parties. If the members of the Corrosion Advisory Panel do not agree with each other on any advice or recommendation on any matter, each member shall report his or her advice or recommendation on said matter independently. ~~Having reviewed and considered the advice and recommendations of the~~The Corrosion Advisory Panel, ~~the Parties shall make their own independent judgments about the design and length of the System Test and the Consumer Plumbing Test, and the design of the System Monitoring Plan and about the interpretation of the results from the System Test and the Consumer Plumbing Test shall be advisory, and shall have no authority to impose any obligations or requirements on either Party.~~

## 8. WATER QUALITY.

**8.1 Water Quality Issues.** ~~With respect to Product Water produced by the Project, Poseidon and the District agree to work cooperatively to conduct, prior to determinations of the Delivery Regime and Interconnection Points, mutually acceptable~~The Parties acknowledge and agree that (i) all technical studies pertaining to quality, blending, distribution and consumer acceptance (including without limitation customer issues, such as color, cloudiness, taste and odor) of Product Water, the impact of Product Water Quality on customer uses of water, the impact of Product Water on the integrity of existing pipelines, and the impact of additional discharge of municipal and industrial waste from Project facilities (collectively "Water Quality Issues"). ~~These studies shall include advice from a nationally recognized expert on the impact of boron in irrigation water on ornamental plants (the "Boron Expert"). The Boron Expert shall be mutually acceptable to both Parties. Except as provided in Sections 7.2.1, 7.2.2 and 7.2.3, Poseidon, at its cost and expense, shall be responsible for such technical studies related to the Water Quality Issues. The Delivery Regime and any revisions to have been undertaken, and (ii) that no changes to the Delivery Regime or the Quality Standards for Product Water shall take into account the results of~~there are required as a result of such technical studies described above. Without limiting the generality of the foregoing, Poseidon and the District agree to meet prior to the Commercial Operation Date, and, upon request of the District, during the Term on a periodic basis with the District's major water customers, such as breweries, nurseries, landscape irrigators, agricultural growers, biotechnology companies and cleaners, to discuss and work to resolve issues those customers may have with receiving Product Water. Poseidon shall cooperate with the District in resolving Water Quality Issues. Notwithstanding the foregoing, any change in the Delivery Regime or Quality Standards developed pursuant to this Agreement shall be mutually agreed by the Parties. Poseidon shall use commercially reasonable efforts to address Water Quality Issues associated with the blending of Product Water and other water in the Authority's Second Aqueduct to the extent such issues would not have arisen had the Product Water been the same as such other water.

**8.2 Quality Standards. Compliance with Law, Pressure Parameters and Water Quality Standards.** All Product Water produced by the Project and delivered to the Delivery Points must meet all of the following standards (collectively the "Quality Standards"): (a) all drinking water quality standards under Applicable Law (whether now in force or hereafter adopted) and action levels now in force or hereafter adopted by the California Department of Health Services, (b) the water quality specifications set forth in Schedule 8.2. and (c) any mutually-agreed change to the Quality Standards with respect to the Water Quality issues described in Section 8.1 above ~~or otherwise identified in the technical studies performed with respect to such Water Quality Issues.~~ Attached as Schedule 8.2 are the Quality Standards with respect to the Project as of the Effective Date. The Quality Standards in Schedule 8.2 include permitted variations for each water quality parameter specified. If the Product Water produced by the Project at any time fails to meet all Quality Standards, then Poseidon immediately shall notify the District, and the District and Poseidon shall meet promptly thereafter to determine what corrective measures, if any, need to be taken. The Parties acknowledge that corrective measures may include, without limitation, segregating Product Water that fails to meet all Quality Standards. Poseidon shall be responsible for any and all state and federal fines resulting from Product Water that does not meet Applicable Law for drinking water quality.

**8.3 Finalization of Water Quality Specification for Boron.** The Parties shall use commercially reasonable efforts to determine, within one hundred and eighty (180) days after the Effective Date, acknowledge and agree that a mutually-acceptable concentration limitslimit for Boron to ~~be~~ has been included in Schedule 8.2.

**8.4 District's Non-Acceptance.** The District shall not be obligated to accept or pay for Product Water of quality that does not meet the Quality Standards.

**8.5 Compliance with Regulations on Water Quality.** As a purveyor of drinking water, the District is required to comply with regulations that address water quality in the Distribution System and at the consumer's tap ("Consumer Quality Standards"). If, following the introduction of Product Water, the District is in violation of the Consumer Quality Standards, then the District immediately shall notify the Poseidon, and the District and Poseidon shall meet promptly thereafter to determine what corrective measures, if any, need to be taken. If a Product Water Causation Event (as defined below) occurs, then the District, upon written notice to Poseidon, may suspend deliveries of Product Water, and the District shall not be obligated to pay for Product Water that causes the District to be in violation of the Consumer Quality Standards; provided, however that prior to such suspension the District and Poseidon shall use all commercially reasonable efforts to implement alternative corrective measures to address a violation of the Consumer Quality Standards. A "Product Water Causation Event" shall mean the occurrence of the following three (3) conditions: (i) Product Water causes the District be in violation of the Consumer Quality Standards, (ii) such violation would not be caused by the District's likely alternative water supply and (iii) such violation is not also caused in whole or in part by any action or omission of the District. Poseidon shall be responsible for any and all state and federal fines resulting from a Product Water Causation Event. With respect to the issue of causation of a District violation of the Consumer Quality Standards, nothing set forth in this Section 8.5 shall be deemed or construed to shift the burden of proof to Poseidon, or as a waiver by Poseidon of any claims or defenses.

## **9. DELIVERY OF WATER.**

**9.1 Delivery of Water.** Subject to Sections 3.2.2 and 9.2, Poseidon shall pay for all costs and expenses whatsoever of the delivery of Product Water to the Delivery Points in accordance with this Agreement, including without limitation all costs and expenses of compliance with all Applicable Laws related to the delivery of Product Water by Poseidon under the provisions of this Agreement. ~~The~~ Except as specifically provided in this Agreement, the District shall be responsible for all costs and expenses incurred after delivery of Product Water at the Delivery Points by Poseidon in compliance with this Agreement. Subject to Section 8.5, the District shall accept all Product Water meeting the Quality Standards made available at the Delivery Points in accordance with the Delivery Regime.

### **9.2 Appurtenant Facilities and Delivery Points.**

**9.2.1 Construction.** Poseidon, at its cost and expense, shall construct all pipelines, connection points for the facilities described in Section 9.2.2 and 9.2.3 and any other infrastructure (the "Appurtenant Facilities") necessary or required to deliver the Product Water

from the boundary of the Site to the delivery points described on Schedule 9.2.1 (such delivery points together with any additional or substitute points of delivery of Product Water from Poseidon to Buyer pursuant to Section 9.2.2(c) and 9.2.3(d), the “Delivery Points”).

The construction of the facilities required to deliver Product Water into the Authority’s Second Aqueduct (the “Authority Connection Facilities”) shall be at Poseidon’s cost and expense pursuant to an agreement to be entered into by Poseidon, the Authority and Vallecitos.

**9.2.2 Carlsbad Delivery Facilities.** At any time following the closing of Poseidon’s construction financing for the Project until (if ever) Buyer delivers an Acquisition Notice, Buyer may request that Poseidon design and construct the pipelines, and any other infrastructure (the “Carlsbad Delivery Facilities”) necessary or required to deliver Product Water from either: (i) the intersection of Lionshead Avenue and Melrose Avenue to the intersection of Melrose Avenue and Palomar Airport Road or (ii) the intersection of Business Park Drive and Lionshead Avenue to the intersection of Business Park Drive and Palomar Airport Road, subject in either case to the satisfaction of the following conditions:

(a) The District shall have granted, or caused to be granted, to Poseidon all easements, licenses, rights of way and other interests in real property (collectively, the “Real Estate Rights”) necessary for the siting of the Carlsbad Delivery Facilities. Such grant shall be at no cost to Poseidon, other than costs incurred by the District in the acquisition of any real property interest for the purpose of granting such Real Estate Rights to Poseidon.

(b) The Delivery Charge shall be equitably adjusted as mutually agreed by the Parties.

(c) The Parties shall have agreed upon any changes to the Delivery Regime, the Delivery Points and the locations to measure compliance with the Quality Standards.

(d) Poseidon shall have obtained all necessary Legal Entitlements for the construction and operation of the Carlsbad Delivery Facilities.

Upon the satisfaction of the conditions set forth above, Poseidon shall have a commercially reasonable time to engineer, procure, construct, start up and test the Carlsbad Delivery Facilities. Upon the Carlsbad Delivery Facilities being placed into service, the Carlsbad Delivery Facilities shall constitute part of the Appurtenant Facilities for all purposes under this Agreement.

In lieu of requesting Poseidon to construct the Carlsbad Delivery Facilities, Buyer may construct and connect its own facilities necessary or required to deliver Product Water from the Appurtenant Facilities to the Distribution System, subject to (i) the Parties having agreed upon any changes to the Delivery Regime, the Delivery Points and the locations to measure compliance with the Quality Standards and (ii) the connection and operation of such facilities of Buyer not adversely affecting Poseidon’s construction and operation of the Appurtenant Facilities.

**9.2.3 Additional Facilities.** Prior to the Commercial Operation Date, Poseidon shall complete the design of the pipelines and any other infrastructure (the “Additional Facilities”)



necessary or required to deliver Product Water as shown on Schedule 9.2.1 to a level sufficient to commence their construction (the "Additional Facilities Design"). At any time from the fifth (5th) anniversary of the Commercial Operation Date until (if ever) Buyer delivers an Acquisition Notice, Buyer may request that Poseidon construct the Additional Facilities and upon such request Poseidon shall construct the Additional Facilities, subject to the satisfaction of the following conditions:

(a) The District shall have granted, or caused to be granted, to Poseidon all Real Estate Rights necessary for the siting of the Additional Facilities. Such grant shall be at no cost to Poseidon, other than costs incurred by the District in the acquisition of any real property interest for the purpose of granting such Real Estate Rights to Poseidon.

(b) Poseidon shall have obtained financing for the construction of the Additional Facilities on terms acceptable to the District.

(c) The Delivery Charge shall be equitably adjusted as mutually agreed by the Parties.

(d) The Parties shall have agreed upon any changes to the Delivery Regime, the Delivery Points and the locations to measure compliance with the Quality Standards.

(e) Poseidon shall have obtained all necessary Legal Entitlements for the construction and operation of the Additional Facilities.

Upon the satisfaction of the conditions set forth above, Poseidon shall have a commercially reasonable time to engineer, procure, construct, start up and test the Additional Facilities. Upon the Additional Facilities being placed into service, the Additional Facilities shall constitute part of the Appurtenant Facilities for all purposes under this Agreement.

In lieu of requesting Poseidon to construct the Additional Facilities, Buyer may construct and connect its own facilities necessary or required to deliver Product Water from the Appurtenant Facilities to the Distribution System, subject to (i) the Parties having agreed upon any changes to the Delivery Regime, the Delivery Points and the locations to measure compliance with the Quality Standards and (ii) the connection and operation of such facilities of Buyer not adversely affecting Poseidon's construction and operation of the Appurtenant Facilities.

**9.2.4 9.2 Delivery Points.** The Parties shall use commercially reasonable efforts to determine, within twelve (12) months after the Effective Date, mutually acceptable interconnection points ("Interconnection Points") for the interconnection of the Appurtenant Facilities with the Distribution System. Poseidon, at its cost and expense, shall construct all conveyance facilities, pipelines, pumps, pump stations and any other infrastructure (the "Appurtenant Facilities") necessary or required to deliver the Product Water to the Interconnection Points. At any time after the Interconnection Points have been determined, the District may notify Poseidon that the District elects to: (i) own **Transfer**. At any time after the Commercial Operation Date (and if Buyer has requested Poseidon to construct the Carlsbad Delivery Facilities pursuant to

Section 9.2.2 or the Additional Facilities pursuant to Section 9.2.3, after such facilities have been placed in service), Buyer may provide a notice to Poseidon (an "Acquisition Notice") that Buyer elects to: (i) acquire the Appurtenant Facilities (except for the pumping station located at the Encina Power Station) upon their completion or a portion thereof (the "Transferred Facilities") or (ii) have a joint powers authority own the Appurtenant Facilities, provided such joint powers authority has equivalent capabilities to those of the District Buyer to operate and maintain the Appurtenant Transferred Facilities. If the District Buyer makes such an election, the Parties shall negotiate in good faith on the terms of an agreement acceptable to both parties (the "Appurtenant Transferred Facilities Agreement") to: (i) transfer (the Appurtenant "Facilities to the District Transfer") the Transferred Facilities to Buyer (or a joint powers authority as described above) for a nominal amount subject to either assuming the financing associated with the Transferred Facilities or providing sufficient security to Poseidon's financing parties that had a security interest in the Transferred Facilities immediately prior to the Transfer; and (ii) provide for the operation and maintenance of the Appurtenant Transferred Facilities by the District Buyer or its designee (or a joint powers authority as described above) (including their operation to transport Product Water in excess of the Contract Capacity for third-parties on terms sufficient to support Poseidon's obligations to such third-parties). If the District, and (iii) allow Poseidon the right to use the Transferred Facilities at no charge to Poseidon for the delivery of up to 56,000 acre-feet per year Product Water from the Project pursuant to the initial term or an extension of the term of one or more of the Water Purchase Agreements. If Buyer makes such an election, the "Delivery Point Parties shall, in good faith, determine mutually acceptable changes to the Delivery Points, the Delivery Regime and the locations to measure compliance with the Quality Standards, and Poseidon shall provide Product Water at such Delivery Points at sufficient pressure for such Product Water to be transported to the previous Delivery Points. The Transferred Facilities transferred to Buyer pursuant to this Section 9.2.4 shall no longer constitute part of the "Project" for the purpose of this Agreement shall be the connection of the Project and the Appurtenant Facilities; otherwise the Delivery Point(s) shall be the Interconnection Point(s). If the District (or a joint powers authority as described above) operates the Appurtenant Facilities the Base Price shall be reduced by the non-capital portion of the Delivery Charge which represents Poseidon's projected cost of operating and maintaining the Appurtenant Facilities. If the District has elected to own, or have a joint powers authority own, the Appurtenant Facilities, the District may, at any time up to one hundred and eighty (180) days before the Projected Commencement Date, elect to finance the cost of the Appurtenant Facilities; provided that the District's proposed financing structure shall not adversely affect Poseidon's ability to finance the Project or perform its other obligations under this Agreement. If the District makes such an election, the Base Price shall be reduced by the capital portion of the Delivery Charge which represents Poseidon's projected cost of financing construction and operation of the Appurtenant Facilities.

**9.2.5 Use of Appurtenant Facilities.** Subject to Poseidon obtaining all required Legal Entitlements, Poseidon shall have the right to use (or have an affiliate use), whether before or after an Appurtenant Facilities Transfer, the Appurtenant Facilities (excluding the Carlsbad Delivery Facilities and the Additional Facilities) for the delivery of Product Water to Buyer or third parties in excess of the amounts contemplated to be delivered under the Water Purchase Agreements in effect as of the Agreement Date, provided: (i) such use does not

materially and adversely affect Poseidon's ability to perform its obligations under this Agreement; (ii) such use does not materially and adversely affect any rights of Buyer under this Agreement; (iii) the purchasers of such excess Product Water shall pay for the entire costs of construction, financing, operation and maintenance applicable to any the facilities constructed specifically for the production and transportation of such excess Product Water; and (iv) the Delivery Charge shall be reduced to reflect the payment of an equitable portion of the costs of construction, financing, operation and maintenance of the Appurtenant Facilities applicable to the delivery of the amount of Product Water contemplated to be delivered under the Water Purchase Agreements in effect as of the Agreement Date.

**9.3 Delivery Regime.** The provisions of this Section 9.3 constitute the delivery regime (the "Delivery Regime") for the delivery of Product Water from the Project to Buyer.

**9.3.1 Plant Outages.** In order to provide an allowance for scheduled inspections, maintenance and repairs, Poseidon estimates that the Project will operate approximately three hundred fifty (350) days per year. Not later than sixty (60) days prior to the beginning of each Water Year, Poseidon will provide Buyer with an estimated schedule of the dates and times for Project maintenance and shutdowns of Product Water deliveries for such Water Year and shall coordinate such maintenance and shutdowns with maintenance undertaken by Buyer or the Authority. A regular review and update of the estimated shutdown schedule will be made in consultation with the coordinating committee constituted pursuant to Section 6.4, provided that all decisions regarding the timing of any shutdowns will be made by Poseidon. Subject to applicable regulatory and operational constraints on Buyer's use of its water storage facilities, Buyer agrees to maintain sufficient resources such as local reservoir storage, groundwater production capacity, system interconnections or alternate supply source to sustain an interruption in Poseidon's Product Water deliveries for the Project maintenance and shutdowns contemplated by this Section 9.3.1.

**9.3.2 Buyer's Daily Quantities.**

(a) Subject to the other provisions of this Agreement (including, without limitation, Section 9.3.2(d)), Buyer shall be entitled to receive daily quantities between 10 MGD and 25 MGD of Product Water (each such quantity, as may be limited pursuant to Sections 9.3.2(b) and 9.3.3(b), a "Daily Quantity"). Buyer shall be entitled to vary its Daily Quantity between 10 MGD and 25 MGD in accordance with the limitations and requirements of the Authority for changes in the amount of Product Water delivered to the Delivery Points provided that: (i) Buyer provides eight (8) hours prior notice to Poseidon of such changes and (ii) such changes are within the capacities of the Appurtenant Facilities. A Buyer notice of the level of its Daily Quantity shall remain in effect until superseded by a subsequent notice.

(b) In the event that the amount of Product Water produced during the thirty (30) day Performance Test is less than 1,533,000,000 gallons, Poseidon shall have the right to reduce any or all Daily Quantities of Buyer as follows (provided Poseidon shall reduce the Daily Quantities of each other Water Purchaser proportionately), subject to a maximum reduction of 15%:

(Product Water produced during Performance Test (expressed in millions of gallons) ÷ 1,533,000,000 gallons) x applicable Daily Quantity

Notwithstanding the foregoing, in the event that Poseidon increases the production capability of the Project either through remedial action or by an expansion of the Project, Poseidon's right to reduce Daily Quantities pursuant to this Section 9.3.2(b) shall be equitably adjusted to reflect such increased production capability. Such equitable adjustment shall be determined by Poseidon and the Water Purchasers, each acting in good faith.

(c) Notwithstanding the foregoing, in the event that the aggregate of the Daily Quantities in any Water Year are less than the Carlsbad Minimum Amount (as defined below), then the difference between the Carlsbad Minimum Amount and the aggregate of the Daily Quantities for such Water Year shall be deemed to be Undelivered Water for the last month of such Water Year for which Buyer shall make payment pursuant to Section 9.8 of the Agreement. "Carlsbad Minimum Amount" shall mean for any Water Year eighty percent (80%) of Buyer's Potable Water Demand for such Water Year (prorated in each case for any Water Year of less than twelve (12) months) minus the total amount of the reductions of the Daily Quantities for such Water Year implemented by Poseidon pursuant to Section 9.3.2(b). "Potable Water Demand" shall mean all water introduced into the Distribution System except for water delivered into Buyer's recycled water distribution system for the purpose of augmenting Buyer's recycled water supplies.

(d) Buyer may elect to reduce its Daily Quantity below 10 MGD (but no lower than to 8 MGD) for up to thirty (30) days (which need not be consecutive) in any Water Year (prorated for any Water Year of less than twelve (12) months), but in no event more than one hundred twenty five (125) days in any five (5) consecutive Water Years, subject to first using commercially reasonable efforts to receive Product Water, including maximizing available water storage and reducing deliveries of water from third parties. In the event that Buyer has reduced its Daily Quantity pursuant to this Section 9.3.2(d), if subsequently requested by Poseidon, Buyer shall use commercially reasonable efforts (including maximizing available water storage and reducing delivery of water from third parties) to receive Product Water in an amount equal to such reduction during any period in which Buyer is not exercising its rights under this Section 9.3.2(d).

(e) Buyer may request Poseidon to provide an amount of Product Water exceeding Buyer's Daily Quantity, and to the extent the Project is able to produce such Product Water operating in accordance with Prudent Industry Practices and satisfying Poseidon's obligations under the other Water Purchase Agreements, Poseidon shall provide such amount of Product Water in excess of Buyer's Daily Quantity.

(f) To the extent Poseidon has not been able to provide Buyer with its Daily Quantity, if subsequently requested by Poseidon, Buyer shall use commercially reasonable efforts (including maximizing storage and reducing delivery of water from third parties) to receive Product Water in an amount up to the amount of such shortfall.

### **9.3.3 Required Amount of Product Water.**

(a) Notwithstanding anything in this Agreement to the contrary, the amount of Product Water required to be delivered to or accepted by Buyer for the purposes of Sections 9.7, 9.8, 14.1.1, 14.1.2, 14.3.2 or Schedule 3 of this Agreement (the "Contract Quantity") shall be equal to the sum of the Daily Quantities for the days in the applicable period (Billing Month, Initial Period, Extended Period, Year Period, or Water Year, as applicable).

(b) Buyer shall be entitled to receive a maximum of 25,100 acre-feet of Product Water in any Water Year (prorated for any Water Year of less than twelve (12) months). Notwithstanding the foregoing, upon notice to Buyer, Poseidon shall be excused from delivering Daily Quantities of Product Water in an aggregate amount not to exceed 1,032 acre feet of Product Water in any Water Year (prorated for any Water Year of less than twelve (12) months) (an "Excused Amount"). Solely on account of such Excused Amount, Buyer shall have no right to exercise its remedies under Sections 9.7, 14.1.1, 14.1.2 and 14.3.2, so long as (i) Poseidon has notified each other Water Purchaser that Poseidon is excused from delivering the same proportion of the Daily Quantity of each other Water Purchaser under Section 9.3.3(b) of each other Water Purchase Agreement; and (ii) the aggregate of the Excused Amounts under all of the Water Purchase Agreements in any Water Year shall not exceed 2,301 acre-feet minus the reductions of the Daily Quantities of all Water Purchasers in such Water Year implemented by Poseidon pursuant to Section 9.3.2(b) of each Water Purchase Agreement. In no event shall Buyer be entitled to receive more than 25,100 acre-feet of Product Water in any Water Year (prorated for any Water Year of less than twelve (12) months).

**9.3.4 Pre-Deliveries of Product Water.** The Parties acknowledge that Buyer's use of its water storage facilities are subject to certain regulatory and operational constraints. The Parties agree to cooperate in studying how to reduce or remove such constraints, the costs of which shall be equitably allocated between the Parties to reflect the relative benefit to each Party of reducing or removing such constraints. In the event such constraints are removed or sufficiently reduced as mutually agreed by the Parties, if requested by Poseidon, Buyer shall use commercially reasonable efforts to accept pre-deliveries of up to 100 million gallons of Product Water for storage ("Pre-delivered Water") between November 1 and March 31 of any two consecutive Water Years (a "Pre-delivery Period") provided that Buyer reasonably determines that it will use such Pre-delivered Water by November 1 immediately following such Pre-delivery Period. The timing of delivery of Pre-delivered Water for the purposes of Buyer's payment obligations for such water shall be determined pursuant to this Section 9.3.4. If Poseidon requests such Pre-delivered Water to be used to meet all or any portion of a Daily Quantity of Buyer and Buyer is reasonably able to withdraw an amount of water from storage to meet such request (up to the amount of Pre-delivered Water), the amount of Pre-delivered Water in such request shall be deemed delivered to Buyer upon Buyer's withdrawal of such amount of water. To the extent that the Pre-delivered Water for a Pre-delivery Period has not been withdrawn pursuant to the previous sentence by the November 1 immediately following such Pre-delivery Period, such remaining Pre-delivered Water (including any such Pre-delivered Water withdrawn by Buyer unrelated to any request of Poseidon) shall be deemed to be delivered to Buyer on such date.

**9.3.5    9.3 Delivery SchedulePre-Commercial Operation Date Deliveries.**

~~Poseidon and the District~~Upon notice from Poseidon to Buyer, the Parties shall use commercially reasonable efforts to develop, within twelve (12) months after the Effective Date, a mutually acceptable delivery regime (the "Delivery Regime") a protocol for the delivery of Product Water from the Project to the District. The Delivery Regime shall include a schedule of delivery so that the average daily amount delivered to the District after the Commercial Operation Date is sufficient to meet the District's minimum daily requirements for Product Water (up to the Contract Capacity). The Delivery Regime also shall be developed in coordination with the delivery regimes for other purchasers of Product Water from the Project and for Product Water delivery prior to the Commercial Operation Date to the extent Product Water that meets the Quality Standards and can be sold to the District prior to the Commercial Operation Date under Applicable Law.

**9.3.6    Local Use.** Buyer shall not deliver, transfer or exchange Product Water, or other water in lieu of Product Water, outside of the service area of MWD.

**9.4        Conveyance Losses.** Poseidon shall be responsible for any water losses incurred in the delivery of Product Water to the District up to the Delivery PointPoints.

**9.5        Meters and Records.**~~The Delivery Regime shall include mutually acceptable procedures addressing the locations, testing and use of appropriate measurement devices to measure the quantity and quality of Product Water delivered to the District. At a minimum, all water release structures at the Delivery Points shall be equipped with totalizing flow meters and Poseidon shall prepare and keep monthly readings therefrom. Throughout the Term, Poseidon shall maintain records in accordance with the requirements of Applicable Laws and generally accepted accounting principles, as appropriate, pertaining to the quantity and quality of water delivered pursuant to this Agreement. The District shall be entitled to read the meters at least once per month during regular business days and hours and to request and receive from Poseidon copies of all such water delivery, quantity and quality records.~~

**9.5.1    Meters.** The quantity of Product Water delivered by Poseidon shall be metered at the Delivery Points. Meter readings shall be made on or about the last day of each calendar month for billing purposes. Buyer shall provide, or cause its designee to provide, all data from each such meter reading within ten (10) days after such reading. Poseidon shall install meters and control valves at the Delivery Points meeting the criteria set forth in the Water Authority's Administrative Code Article 5, Section 5.00.020. Upon installation, such meters shall be transferred to, and shall be owned and operated by Buyer or its designee. Meters shall be tested at intervals of not less than one year at the expense of Buyer or its designee. Poseidon may request to have the meters tested at any time during normal business hours and upon reasonable advance notice at its own expense, but such test shall be made by Buyer or its designee. In the event that any such test discloses an error exceeding plus or minus two (2%) percent, an adjustment shall be made in charges against Buyer covering the known or estimated period of duration of error, but in no event exceeding six (6) months.

**9.5.2    Recordkeeping.**

(a) Poseidon shall be responsible for administration and record keeping of

deliveries of Buyer's Contract Quantity to the Delivery Points. Buyer is responsible for the allocation of all Product Water after its delivery to the Delivery Points and any corresponding administration and record keeping including wheeling, exchanges or storage agreements with other Water Purchasers, or wheeling and in-lieu exchanges with the Authority. Poseidon shall maintain records of the operation of the Project in accordance with Prudent Industry Practices, and shall make such records available to Buyer in the event Buyer acquires the Project pursuant to this Agreement.

(b) Poseidon shall provide all reasonable assistance and cooperation to enable Buyer to comply with the audit, cost-accounting, disclosure, and record-keeping provisions of the MWD Contribution Agreement, including but not limited to Section 2.1, 4.1, 4.2, 7.1, 8.4, 8.5, 8.8, 8.9, 9.2, and 10 thereof.

(c) Buyer, or any entity designated to perform the functions required under Section 4.2 of the MWD Contribution Agreement, shall have the right to audit the records of Poseidon regarding Project production, deliveries to Water Purchasers, costs, and other data relevant to the terms of the MWD Contribution Agreement for a period of five (5) full Fiscal Years (as defined in the MWD Contribution Agreement) prior to such request to audit. Buyer or its successor may elect to have such audits conducted by its staff or by others, including independent accountants, as designated. Upon thirty (30) days' written notice, Poseidon shall make available for inspection all records, books and other documents, including all billings and costs incurred by contractors, relating to the construction, operation, or maintenance of the Project; any grants and contributions, as described in Exhibits B, C, and D to the MWD Contribution Agreement; or any capital cost financing for the Project. Poseidon shall allow MWD's personnel or its designees to participate in inspecting Poseidon's records and books for the purpose of conducting such audits of Project costs.

(d) MWD and the Authority shall each have the right to audit the records of Poseidon regarding Project production, deliveries to Water Purchasers, costs, and other data relevant to the terms of the MWD Contribution Agreement for a period of five (5) full Fiscal Years prior to such request to audit. MWD or the Authority may elect to have such audits conducted by its staff or by others, including independent accountants, as designated. Upon thirty (30) days' written notice, Poseidon shall make available for inspection all records, books and other documents, including all billings and costs incurred by contractors, relating to the construction, operation, or maintenance of the Project; any grants and contributions, as described in Exhibits B, C, and D to the MWD Contribution Agreement; or any capital cost financing for the Project.

(e) Poseidon shall establish and maintain accounting records of all costs incurred for the construction, operation and maintenance, and replacement costs for the Project as described in Exhibits B, C, and D to the MWD Contribution Agreement. Accounting for the Project shall utilize generally accepted accounting practices and be consistent with the terms of the MWD Contribution Agreement.

(f) In the event of a dispute arising under this Agreement, Poseidon shall not dispose of any records relating to such dispute until a final resolution thereof.

(g) In the event that the MWD Contribution Agreement is terminated or is otherwise no longer in effect, the provisions of Section 9.5.2(b), (c), (d) and (e) shall be of no further force or effect.

**9.6 Reports.** ~~On or before the tenth~~ Within ten (10th) day of each month during the Term commencing after the Commercial Operation Date, days after Buyer provides Poseidon the data described in Section 9.5.1, Poseidon shall send written reports to the District setting forth the amount of Product Water and the quality of Product Water delivered to the Delivery Points during the immediately preceding month pursuant to this Agreement.

**9.7 Liquidated Damages for Failure to Deliver.** If Poseidon shall fail to deliver at least ninety-six percent (96%) (the "Threshold") of the Product Water meeting the Quality Standards required by the Delivery Regime for any Initial Period or Extended Period (as each are defined below) for any reason other than a Force Majeure event (as defined in Section 17 hereof) or a breach of this Agreement by the District, then Poseidon shall pay the District as liquidated damages and not as a penalty: (i) for an Initial Period, an amount equal to the positive difference, if any, between the (A) per acre foot cost incurred by the District to obtain water and (B) Purchase Price, for each acre foot of Product Water below the Threshold for the Initial Period that Poseidon failed to deliver; and (ii) for an Extended Period, an additional amount equal to fifty dollars (\$50) per acre foot, for each acre foot of Product Water below the Threshold for the Extended Period that Poseidon failed to deliver. "Initial Period" shall mean, as of any day commencing on or after the ~~thirtieth/ninetieth~~ (30/90th) day after the Commercial Operation Date, the ~~thirty/ninety~~ (30/90) days immediately preceding such day. "Extended Period" shall mean, as of any day commencing on or after the one hundred and eightieth (180th) day after the Commercial Operation Date, the one hundred and eighty (180) days immediately preceding such day. Poseidon shall make payment of any liquidated damages by the thirtieth (30th) day of the month immediately following the month containing the last day of the Initial Period(s) or Extended Period(s) for which such liquidated damages arose. If Poseidon pays liquidated damages pursuant to this Section 9.7 for any Initial Period for Product Water Poseidon failed to deliver, Poseidon shall, solely for the purpose of determining whether Poseidon has met the Threshold in subsequent Initial Periods, be deemed to have delivered such Product Water. ~~If Poseidon pays~~ For purposes of calculating liquidated damages pursuant to this Section 9.7 for any Extended Period for Product Water Poseidon failed to deliver, Poseidon shall, solely for the purpose of determining whether Poseidon has met the Threshold in subsequent Extended Periods, under this Section, if a failure to deliver the Daily Quantity on any given day results in a failure to meet the Threshold for the Initial Period or Extended Period ending on such day, then Poseidon will be deemed to have delivered such Product Water the full Daily Quantity on such day for purposes of computing whether it has met the Threshold during each subsequent Initial Period or Extended Period that includes such day provided that Poseidon pays the liquidated damages for the Initial Period or Extended Period ending on such day. Poseidon expressly acknowledges that this provision is reasonable under the circumstances existing as of the ~~date of this Agreement~~ Date. The Parties acknowledge that (i) the determination of the actual damages which are liquidated pursuant to this Section 9.7 is impracticable or extremely difficult, (ii) otherwise obtaining an adequate remedy is inconvenient and (iii) the liquidated damages provided for under this Section 9.7 constitute a reasonable



approximation of the harm or loss. The Parties agree that unless the failure to deliver Product Water constitutes a Poseidon Event of Default pursuant to Section 14.1.1 (in which case, this Section 9.7 shall no longer apply in the event the District pursues its remedies for a Poseidon Event of Default), the payment of such liquidated damages shall be the District's sole remedy for Poseidon's failure to deliver Product Water to the District. Poseidon's obligations under this Section 9.7 shall not be reduced or otherwise affected by any balance in the Tracking Account.

**9.8 District Failure to Accept Product Water.** To the extent Poseidon is unable to deliver Product Water as required by the Delivery Regime as a result of (i) a breach of this Agreement by the District or (ii) the Authority's failure or inability to accept or deliver such Product Water (for any reason other than any failure or inability resulting from an event of Force Majeure described in clause (l) of Section 17.2), the District shall make payment for such undelivered Product Water ("Undelivered Water") as if such Undelivered Water had been delivered to the District. Upon the request of the District, Poseidon shall use commercially reasonable efforts to sell such Undelivered Water to third parties (including Product Water which is deemed to be Undelivered Water pursuant to Section 9.3.2(c) if Poseidon has sufficient notice from Buyer and is able, using commercially reasonable efforts, to deliver such Undelivered Water during the current Water Year) and to the extent it is unable to do so, shall use commercially reasonable efforts to provide such Undelivered Water upon the District's request. Amounts received by Poseidon from the sale of such Undelivered Water shall be paid to the District until the District has been reimbursed for the amount paid by the District for such Undelivered Water pursuant to this Agreement. The Parties agree that, unless the failure to accept Product Water constitutes a District Event of Default pursuant to Section 14.3.2 (in which case, this Section 9.8 shall no longer apply in the event Poseidon pursues its remedies for a District Event of Default), the District's payment for Undelivered Water shall be Poseidon's sole remedy for the District's failure to accept Product Water as a result of a breach by the District. For the purposes of this Agreement, Buyer shall be deemed to have received the MWD Incentive and the Authority Incentive with respect to Undelivered Water.

## **10. PRIORITY FOR PROJECT WATER, PRICE REDUCTION.**

**10.1 Priority.** Poseidon shall not prefer any person, public corporation, agency, or other consumers over the District with respect to delivery of water from the Project as a customer of Poseidon; provided, however that, except as provided in Sections 9.3.2(b) and 9.3.3(b), in the event that the Project does not produce enough Product Water for Poseidon to meet its obligations to the District under this Agreement and to other purchasers of Product Water (a "Shortfall"), then for the first five (5) days of any such Shortfall Poseidon may allocate Product Water so that the effects of the Shortfall are first borne by the District for such five (5) day period. If the Shortfall lasts more than five (5) days, then Poseidon shall allocate Product Water so that the effects of the Shortfall are first borne by such other purchasers for the second five (5) day period of such Shortfall. If a Shortfall lasts more than ten (10) days, Poseidon shall allocate Product Water for the remainder of the Shortfall proportionately among all purchasers (including the District) based upon amounts of Product Water each purchaser is obligated to purchase from Poseidon. Nothing in this Section 10.1 shall limit Poseidon's obligations under Section 9.7 or the District's remedies upon the occurrence of a Poseidon Event of Default. Poseidon's obligations under this Agreement

shall not be affected by any agreements entered into by Poseidon and other ~~purchasers of Product Water~~ Purchasers.

**10.2 Price Reduction.** If Poseidon sells, conveys or transfers Product Water for a price per acre foot that is less than the Base Price but otherwise on substantially the same terms and conditions as contained in this Agreement, the Base Price immediately shall be lowered to such lesser price per acre foot for all purchases of Product Water during the period Poseidon makes such third-party sales. If Poseidon fails to lower the Base Price as aforesaid, then for all such sales of Product Water for which the Base Price was not lowered, the District shall receive a credit toward the Purchase Price (or a payment by Poseidon) that is equal to the amount by which the Base Price charged under this Agreement exceeded such lesser price per acre foot for the amount of Product Water sold by Poseidon at such lesser price per acre foot.

## **11. USE OF MAERKLE RESERVOIR.**

**11.1 Maerkle Lease.** Provided an uncured Poseidon Event of Default has not occurred, then upon Poseidon's request, the District may lease to Poseidon, for an initial term of not less than thirty (30) years after the Commercial Operation Date, capacity rights in Maerkle Reservoir sufficient to store Product Water in amounts determined necessary by Poseidon, and agreed to by the District, for delivery of Product Water produced by the Project to wholesale customers other than the District. The lease (the "Maerkle Lease") will be consistent with the principles for joint use of Maerkle Reservoir more particularly set forth in Section 11.4 below.

**11.2 ~~Appurtenant~~Construction of Facilities.** If the Parties enter into the Maerkle Lease, then Poseidon, at its cost and expense, shall construct all: (a) ~~Appurtenant Facilities~~ facilities necessary or required to move Product Water into Maerkle Reservoir; and (b) all facilities necessary or required to move Product Water out of Maerkle Reservoir for the purpose of delivering such Product Water to wholesale customers other than the District. Subject to any adjustment to the Delivery Charge pursuant to Section 9.2.9.2.5, Poseidon also shall be responsible for all capital, operating and maintenance costs associated with connecting Maerkle Reservoir to such ~~Appurtenant Facilities~~ facilities as are necessary to transport Product Water into Maerkle Reservoir and to such facilities as are necessary to transport Product Water out of Maerkle Reservoir for the purpose of delivering such Product Water to wholesale customers other than the District.

**11.3 District's Obligation.** The District will operate and be responsible for all operating and maintenance costs associated with facilities for transporting installments of Contract Capacity purchased by the District from the Delivery Points into the Distribution System.

**11.4 Principles for Joint Use.** Poseidon and the District shall cooperate to develop mutually-acceptable principles for joint use of Maerkle Reservoir consistent with the intent of this Agreement. The principles for joint use shall be included in the Maerkle Lease and will address, without limitation, the following issues: (a) quantification of Poseidon's leased capacity right; (b) the number and length of extension terms (which shall be at least coextensive with the Term of this Agreement); (c) rent and/or other consideration Poseidon will pay or provide the District in consideration for the lease of capacity rights, use of District property and operation of Maerkle

Reservoir (provided however, that Poseidon shall not have to pay rent and/or other consideration to the extent its leased capacity right is used to deliver Product Water to the District); (d) a reservoir operating plan and water delivery regime that takes into consideration the District's operational and 10-day storage requirements; and (e) water quality ~~and~~ regulatory compliance and operational constraints.

**12. INSURANCE.** From commencement of construction of the Project, Poseidon shall obtain and maintain, or cause to be obtained and maintained, the types and amounts of insurance coverages for the Project set forth on Schedule 12. The District may require Poseidon to obtain and maintain insurance coverages in addition to those described on Schedule 12 (the "Additional Insurance"), subject to (i) such Additional Insurance being commercially available and (ii) the District reimbursing Poseidon for the cost of the premiums for such Additional Insurance. Poseidon shall deliver proof reasonably acceptable to the District of properly executed insurance coverages evidencing compliance with the insurance requirements herein at least ten (10) days prior to Poseidon's anticipated date for commencement of construction of the Project (the "Projected Commencement Date").

**12.1 Form.** Each policy required under Section 12 shall: (a) be provided at Poseidon's expense; (b) be issued by an insurance company which maintains a Best's rating of at least A- during the term of the applicable policy or is otherwise reasonably acceptable to the District and (c) require the insurer to provide the District thirty (30) days prior written notice (ten (10) days for non-payment of premium), by certified mail, return receipt requested, of cancellation or intent not to renew any policy of insurance required in this Agreement. Certificates and endorsements evidencing such insurance coverage shall be delivered to the District by Poseidon prior to the Projected Commencement Date. To the extent that an insurance company providing a policy required under this Section 12 fails to maintain a Best's rating of at least A- and is not otherwise reasonably acceptable to the District, Poseidon shall promptly replace such insurance company with a company meeting the requirements of this Section 12.1. Current Insurance Service Office (ISO) or other reasonable and customary policies, forms and endorsements or broader shall be used where applicable.

**12.2 District's Right to Procure.** If Poseidon fails to keep the insurance coverages required in this Agreement in full force and effect with insurance companies which maintain a Best's rating of at least A- or which are otherwise reasonably acceptable to the District, the District, subject to the rights of Poseidon's lenders, may (but shall have no obligation to) at any time or from time to time, after giving notice thereof to Poseidon, procure such insurance and pay the premiums therefor, in which event Poseidon shall repay the District all sums paid by the District (other than for Additional Insurance), and any costs or expenses incurred by the District in connection therewith, together with interest thereon at the Overdue Rate from the date due until paid in full, within ten (10) days following the District's written demand to Poseidon for such payment. The cost of such insurance premium and the cost of any claims or losses for which Poseidon would be liable to the District under this Agreement which fall within the applicable deductibles or self-insured retention amounts may be deducted, at the option of the District, from payments otherwise due Poseidon. The District shall be under no obligation to purchase such insurance or be responsible for the coverages purchased or the financial stability or responsibility of the

insurance company used. The decision to purchase such insurance coverages shall in no way be construed as a waiver of the District's rights under this Agreement.

**12.3 Deductibles, Excess Claims.** The District shall not be responsible for the amount of any deductibles, self-insured retention, or claims which are not covered and claims which exceed available insurance coverage.

**12.4 Additional Insureds.** The District, the City and the RDA each shall be named as additional insureds on all policies of liability insurance required by this Agreement, other than workers' compensation, but including employer's liability.

**12.5 Waiver of Subrogation.** Poseidon shall require its insurance carrier(s) furnishing the insurance required herein to waive all rights of subrogation against the District, including without limitation each of its directors, officers, agents, representatives and employees, for any and all amounts of claims paid from insurance proceeds. The District shall waive all rights of subrogation against Poseidon, including its directors, officers, agents, representatives and employees, for any and all amounts of claims paid from insurance proceeds.

**12.6 Statement of Insurance.** If at any time the District requests a written statement from any of Poseidon's insurers as to any impairments to any aggregate policy limit, Poseidon promptly shall authorize and have delivered such statement to the District.

**12.7 Primary Insurance for Additional Insureds.** Poseidon's insurance policies shall provide that the insurance afforded by those policies to the additional insureds is primary to all insurance or self-insurance carried by the District. Poseidon acknowledges that all insurance or self-insurance carried by the District is strictly excess and shall not contribute with Poseidon's liability insurance.

### **13. CONDITIONS, ~~ADDITIONAL ASSISTANCE~~**

**13.1 Poseidon's Conditions.** Poseidon's obligations to sell Product Water to the District pursuant to this Agreement shall be subject to satisfaction or waiver by Poseidon, in its reasonable discretion, of the following conditions prior to the Commercial Operation Date:

**13.1.1 ~~CEQA Compliance.~~[Intentionally Omitted]** ~~All requirements for complying with CEQA shall have been satisfied, and no legal challenge to compliance with CEQA shall have been filed within thirty five (35) days of such compliance, or, if filed, a court of competent jurisdiction shall have entered a final judgment sustaining or validating such CEQA compliance.~~

**13.1.2 Compliance with Applicable Laws.** Poseidon shall have completed construction of the Project in accordance with all Applicable Laws and Prudent Industry Practices.

**13.1.3 ~~Governmental Approvals.~~Legal Entitlements.** Poseidon shall have obtained and maintained (or caused its appropriate subcontractors to obtain and maintain) all ~~Governmental Approvals~~Discretionary Legal Entitlements for the construction of the Project,

including the Appurtenant Facilities, and for the sale and delivery of Product Water, subject to outstanding legal proceedings and appeal periods.

**13.1.4 Maerkle Lease.** If Poseidon has requested its execution, the Maerkle Lease shall have been entered into in accordance with Section 11 hereof.

**13.1.5 Additional Water Purchase Agreements.** Poseidon shall have entered into agreements with other purchasers for the remaining output of the Project.

**13.1.6 Supplemental Agreements.** Poseidon shall have entered into Supplemental Agreements in accordance with Section 1.2.

**13.1.7 Product Water Delivery and Quality.** The Parties shall have agreed upon the Delivery Points, the Delivery Charge, ~~the Monitoring System~~ and the Delivery Regime. The System Test shall have been successfully completed.

**13.1.8 Authority Incentive.** The District shall have entered into agreements with all appropriate parties on mutually acceptable terms and conditions (which shall be reasonably acceptable to Poseidon) pursuant to which the District shall receive, either in cash or in credit, the Authority Incentive.

Poseidon acknowledges and agrees that the conditions set forth in Sections 13.1.3, 13.1.4, 13.1.5, and 13.1.6 have been satisfied or are hereby waived.

**13.2 District's Conditions.** The District's obligations to purchase Product Water (other than the Purchase of Product Water prior to the Commercial Operation Date pursuant to the Delivery Regime and to the extent permitted under Section ~~9.39.3.5~~) from Poseidon pursuant to this Agreement shall be subject to satisfaction or waiver by the District, in its reasonable discretion, of the following conditions prior to the Commercial Operation Date:

**13.2.1 CEQA Compliance.** ~~Intentionally Omitted.~~ ~~All requirements for complying with CEQA shall have been satisfied, and no legal challenge to compliance with CEQA shall have been filed within thirty five (35) days of such compliance, or, if filed, a court of competent jurisdiction shall have entered a final judgment sustaining or validating such CEQA compliance.~~

**13.2.2 Compliance with Applicable Laws.** Poseidon shall have completed construction of the Project in accordance with all Applicable Laws and Prudent Industry Practices in all material respects.

**13.2.3 Performance Test.** Poseidon shall have completed the Performance Test successfully.

**13.2.4 ~~Governmental Approvals.~~ Legal Entitlements.** Poseidon shall have obtained and maintained (or caused its appropriate subcontractors to obtain and maintain) all ~~Governmental Approvals~~ Discretionary Legal Entitlements for the construction of the Project,

including the Appurtenant Facilities, and for the sale and delivery of Product Water, subject to outstanding legal proceedings and appeal periods.

**13.2.5 Maerkle Lease.** If Poseidon has requested its execution, the Maerkle Lease shall have been entered into in accordance with Section 11 hereof.

**13.2.6 ~~Subsidy~~MWD Incentive.** The District shall have entered into agreements with all appropriate parties on mutually acceptable terms and conditions pursuant to which the District shall receive, either in cash or in credit, the ~~Subsidy~~MWD Incentive.

**13.2.7 Supplemental Agreements.** Poseidon shall have entered into Supplemental Agreements in accordance with Section 1.2.

**13.2.8 Product Water Delivery and Quality.** The Parties shall have agreed upon the Delivery Points, the Delivery Charge, ~~the Monitoring System~~ and the Delivery Regime. The System Test shall have been successfully completed.

**13.2.9 Development Agreement.** ~~Poseidon and the City shall have entered into a development agreement (the "Development Agreement"), containing the terms and conditions set forth in Exhibit 13.2.9 and such other terms and conditions which are mutually acceptable to Poseidon and the City, and the~~The District shall have determined, in its reasonable judgment, that the lease between Poseidon and Cabrillo Power I LLC is valid and that the Amended and Restated Development Agreement entered into by Poseidon and the City (the "Development Agreement") can run with the leasehold interest created thereby.

**13.2.10 Back-up Water Supply.** The District shall have received an acknowledgment from the Authority that the District is eligible to receive a back-up supply of water from the Authority on terms generally available to the Authority's member agencies.

Buyer acknowledges and agrees that the conditions set forth in Sections 13.2.4, 13.2.5, 13.2.7, 13.2.8, 13.2.9, and 13.2.10 have been satisfied or are hereby waived.

**13.3 CEQA Compliance.** The Parties acknowledge that while all requirements for complying with CEQA shall have been satisfied, a legal challenge to compliance with CEQA has been filed. In the event that a court of competent jurisdiction shall have entered a final judgment invalidating such CEQA compliance and such judgment requires that the Project suspend operations, then the District's obligations to purchase Product Water shall be suspended until all requirements for complying with CEQA are thereafter satisfied (at which time the District's obligations shall be reinstated unless a court of competent jurisdiction shall have entered a final judgment again invalidating such CEQA compliance), and the Term shall be extended by the length of such suspension.

**13.4 ~~13.3~~-Additional Assistance.** Upon request by Poseidon the District shall cooperate with Poseidon in obtaining (i) additional purchasers of Product Water from the Project and (ii) wastewater treatment services as needed for the Project, so long as such cooperation does not impose any cost, expense or other adverse effect on the District outside of the normal course

of business. Poseidon acknowledges that the cooperation of the District with respect to wastewater treatment services does not constitute a commitment to provide such services and that such services are subject to the availability of sufficient treatment or conveyance capacity.

## **14. DEFAULTS AND REMEDIES.**

**14.1 Default by Poseidon.** The occurrence of any of the following (unless caused by a Force Majeure event or a breach of this Agreement by the District) shall constitute a “Poseidon Event of Default” under this Agreement:

**14.1.1 Failure to Deliver Water Supply.** Poseidon's failure to deliver at least (i) eighty seven and one half percent (87.5%) of the Product Water required to be delivered to the District in accordance with the Delivery Regime for any Year Period ~~and~~ (ii) ~~at least~~ 50% of the Product Water required to be delivered to the District in accordance with the Delivery Regime for the six (6) month period commencing on the Commercial Operation Date. For the purpose of this Section 14.1.1 and Section 14.3.2, “Year Period” shall mean, as of any day commencing on or after the one (1) year anniversary of the Commercial Operation Date, the three hundred and sixty five (365) days immediately preceding such day;

**14.1.2 Extended Water Supply Shortfall.** Poseidon's failure to supply at least the Threshold amount of the Product Water required to be delivered to the District pursuant to the Delivery Regime for any five (5) out of eight (8) consecutive Water Years (an “Extended Shortfall”); provided, however that the occurrence of an Extended Shortfall shall not constitute a Poseidon Event of Default unless upon such occurrence: (i) the District is unable to acquire water from an alternative source sufficient to make up the shortfall in the Contract Capacity to be provided to the District hereunder, or (ii) the blending of Product Water with alternative supplies of water obtained by the District to make up such shortfall has a material adverse effect on the quality of water in the Distribution System.

**14.1.3 Failure to Meet Water Quality Standards.** Poseidon's failure to comply with its obligations under Section 8.2;

**14.1.4 Failure to Perform.** Poseidon's failure to observe or perform any of the provisions of this Agreement to be observed or performed by Poseidon (other than the failure to deliver Product Water, to which Sections 14.1.1 and 14.1.2 apply, or the failure to comply with Section 8.2, to which Section 14.1.3 applies), where such failure shall continue for a period of thirty (30) days after written notice of such failure from the District to Poseidon (which notice shall specify in reasonable detail the nature of Poseidon's failure to observe or perform the provisions of this Agreement); provided, however, that if the nature of Poseidon's default under this Section 14.1.4 is such that more than thirty (30) days are required for its cure, then Poseidon shall not be deemed to be in default if Poseidon commences such cure within such thirty (30) day period and thereafter diligently prosecutes such cure to completion;

**14.1.5 Failure to Perform Related Agreements.** The occurrence of an event of default of Poseidon under any other agreement between the Parties which specifically provides that

an event of default under such agreement shall constitute an Event of Default under this Agreement;

**14.1.6 Representations and Warranties.** Any representation or warranty under Section 16 of this Agreement was, when made or supplied, materially untrue and (i) such misrepresentation shall continue uncured for thirty (30) or more days from the date Poseidon notifies the District of such misrepresentation or (ii) Poseidon fails to notify the District of such misrepresentation within thirty (30) days after Poseidon has knowledge of such misrepresentation; and

**14.1.7 Bankruptcy.** The making by Poseidon of any general arrangement or assignment for the benefit of creditors; Poseidon's becoming bankrupt, insolvent or a "debtor" as defined in the United States Bankruptcy Code or any successor statute (unless, in the case of a petition filed against Poseidon, such petition is dismissed within ninety (90) days after its original filing); the institution of proceedings under the bankruptcy or similar laws in which Poseidon is the debtor or bankrupt; the appointing of a trustee or receiver to take possession of substantially all of Poseidon's assets or of Poseidon's interest in this Agreement (unless possession is restored to Poseidon within ninety (90) days after such taking); the attachment, execution or judicial seizure of substantially all of Poseidon assets or Poseidon's interest in this Agreement (unless such attachment, execution or judicial seizure is discharged within ninety (90) days after such attachment, execution or judicial seizure).

## **14.2 District's Remedies.**

**14.2.1 General.** Subject to Section 14.2.2 below, if a Poseidon Event of Default as set forth above shall occur, the District, upon the lapse of the applicable cure period, if any, as also set forth above, may terminate this Agreement and/or pursue any remedy available to it at law or in equity, including without limitation commencing an action against Poseidon for damages recoverable under Section 14.5 incurred by the District in connection with any such event of default.

**14.2.2 Transfer of Project.** In lieu of pursuing any remedy available to it at law or in equity as a result of a Poseidon Event of Default after the Commercial Operation Date, the District shall have the option to terminate the Agreement and take possession of the Project upon (i) payment to Poseidon of an amount sufficient to prepay in full Poseidon's indebtedness incurred for the Project, including all unpaid principal interest, fees and any other amounts (including breakage, prepayment or termination costs) payable to Poseidon's lenders (collectively, the "Debt Repayment Amount") and (ii) receipt of any consent necessary under the lease agreement between Poseidon and Cabrillo Power I LLC Cabrillo Lease. Upon the reasonable request of the District, Poseidon shall use commercially reasonable efforts to obtain any such consent, and if after a Poseidon Event of Default the District notifies Poseidon that the District intends to exercise its rights under this Section 14.2.2, Poseidon is obligated to obtain any such consent.

**14.2.3 Step-In Right.** If a Poseidon Event of Default shall occur after the Commercial Operation Date and the Project is not in operation, the District may enter the Site and operate the Project (the "Step-In Right") until such time as the District receives a notice from



Poseidon that it is ready to re-commence the operation of the Project. If the District elects to exercise its Step-In Right: (i) the District shall operate the Project in accordance with Applicable Laws and Prudent Industry Practice, (ii) the District shall use reasonable efforts to provide Product Water as required pursuant to any agreement between Poseidon and third-party purchasers and (iii) all amounts reasonably incurred by the District for operating and capital expenditures made with respect to the Project shall be credited against amounts owed by the District under this Agreement. The District's Step-In Right shall terminate upon the termination of this Agreement.

**14.3 Default by District.** The occurrence of any of the following (unless caused by a Force Majeure event or a breach of this Agreement by Poseidon) shall constitute a "District Event of Default" under this Agreement:

**14.3.1 Failure to Pay.** The District's failure to pay amounts under this Agreement as and when due, where such failure shall continue for a period of fifteen (15) days after the District has received an Overdue Notice from Poseidon;

**14.3.2 District Failure to Accept Product Water.** The District's failure to: (i) accept at least eighty-seven and one half percent (87.5%) of the Product Water required to be accepted by the District in accordance with the Delivery Regime for any Year Period.

**14.3.3 Failure to Perform.** The District's failure to observe or perform any of the provisions of this Agreement to be observed or performed by the District (other than the failure to make any payments under this Agreement, to which Section 14.3.1 applies or the failure to accept Product Water, to which Section 14.3.2 applies), including, without limitation Article 22, where such failure shall continue for a period of thirty (30) days after written notice of such failure from Poseidon to the District; provided, however, that if the nature of the District's default is such that more than thirty (30) days are required for its cure, then the District shall not be deemed to be in default if the District commences such cure within such thirty (30) day period and thereafter diligently prosecutes such cure to completion;

**14.3.4 Failure to Perform Related Agreements.** The occurrence of an event of default of the District under any other agreement between the Parties which specifically provides that an event of default under such agreement shall constitute an Event of Default under this Agreement; and

**14.3.5 Representations and Warranties.** Any representation or warranty under Section 15 of this Agreement was, when made or supplied, materially untrue and (i) such misrepresentation shall continue uncured for thirty (30) or more days from the date the District notifies Poseidon of such misrepresentation, or (ii) the District fails to notify Poseidon of such misrepresentation within thirty (30) days after the District has knowledge of such misrepresentation.

**14.4 Poseidon's Remedies.** If a District Event of Default as set forth above shall occur, Poseidon, upon the lapse of the applicable cure period, as also set forth above, may terminate this Agreement and/or pursue any remedy available to it at law or in equity, including

without limitation commencing an action against the District for damages recoverable under Section 14.5 incurred by Poseidon in connection with any such event of default.

**14.5 Damages Recoverable.** For the breach of a contractual obligation under this Agreement, the measure of damages is the amount which will compensate the non-breaching party for the detriment proximately caused thereby, or which, in the ordinary course of things, is foreseeable as a probable result of the breach, subject to any applicable defenses with respect to such damages. Loss may be foreseeable as a probable result of the breach (a) in the ordinary course of events, or (b) as a result of special circumstances, beyond the ordinary course of events, of which as of the Effective Date the breaching party knew or should have known. Damages are not recoverable for loss that the breaching party did not have reason to foresee as of the Effective Date as a probable result of the breach.

**14.6 Lease Defaults.** Within five (5) days of Poseidon's receipt of any notice of any event of default with respect to Poseidon under the Cabrillo Lease, Poseidon shall give the District copies of any such notice. Subject to any rights of Poseidon's lenders for the Project, if Poseidon is unable or fails to cure any such event of default within the time permitted under the Cabrillo Lease, then the District, upon written notice to Poseidon (or without notice if the District determines, in its reasonable judgment, that an emergency exists), and without waiving or releasing Poseidon from any of its obligations under this Agreement or the Cabrillo Lease, may (but shall not be required to) cure such event of default (to the extent that the District is capable of curing such event of default) by: (i) making from its own funds any payments payable by Poseidon under the Cabrillo Lease, or (ii) performing any other acts on the part of Poseidon that Poseidon is required to perform under the Cabrillo Lease. Upon the District's curing such event of default in accordance with this Section 14.6, Poseidon agrees to repay to the District all sums paid and all reasonable costs and expenses (including attorneys' fees and costs) incurred by the District in connection with curing such event of default under the Cabrillo Lease, plus interest thereon at the Overdue Rate from the date incurred until paid in full (collectively the "Cure Reimbursement Amount") and until the District actually receives the full Cure Reimbursement Amount from Poseidon, the District may offset any amounts due to Poseidon under this Agreement by the amount of the Cure Reimbursement Amount outstanding from time to time.

**15. REPRESENTATIONS AND WARRANTIES OF THE DISTRICT.** The District hereby makes the following representations and warranties to Poseidon, as of the Effective Agreement Date and (unless specifically made only as of the Effective Agreement Date) as of the Commercial Operation Date:

**15.1 Organization.** The District is a municipal water district, organized and validly existing under the laws of the State of California.

**15.2 Authorization.** The District has the power and authority to enter into and to perform its obligations under this Agreement. The District has: (a) duly authorized this Agreement; (b) approved the execution and delivery of this Agreement; and (c) duly executed and delivered this Agreement by a duly authorized individual.

**15.3 Enforceability.** This Agreement constitutes the valid and legally binding obligation of the District, enforceable against the District in accordance with its terms.

**15.4 Governmental Consents.** No Legal Entitlement from any Governmental Authority is required in connection with the execution and performance of this Agreement by the District. All Legal Entitlements required in connection with the District's performance of this Agreement will be obtained as and when required by Applicable Laws.

**15.5 No Litigation.** ~~As~~Except as set forth on Schedule 2.3.4, as of the Effective Agreement Date, there is no action, suit, proceeding or investigation pending or, to the District's current and actual knowledge, threatened against the District which, if adversely determined, would affect the validity of this Agreement.

**15.6 No Conflict.** The execution and performance of this Agreement by the District does not breach or constitute a default by the District under any law, regulation, ruling, court order, agreement, indenture, certificate of preference, or undertaking or other instrument to which the District is a party or by which the District or any of its property may be bound or affected.

**16. REPRESENTATIONS AND WARRANTIES OF POSEIDON.** Poseidon hereby makes the following representations and warranties to the District, as of the Effective Agreement Date and (unless specifically made only as of the Effective Agreement Date) as of the Commercial Operation Date:

**16.1 Organization.** Poseidon is ~~a limited liability company,~~ duly formed and validly existing under the laws of the State of Delaware, and duly qualified to do and doing business in the State of California.

**16.2 Authorization.** Poseidon has the power and authority to enter into and to perform its obligations under this Agreement. Poseidon has: (a) duly authorized this Agreement; (b) approved the execution and delivery of this Agreement; and (c) duly executed and delivered this Agreement by a duly authorized individual.

**16.3 Enforceability.** This Agreement constitutes the valid and legally binding obligation of Poseidon, enforceable against Poseidon in accordance with its terms.

**16.4 Governmental Consents.** No Legal Entitlement from any Governmental Authority is required in connection with the execution and performance of this Agreement. by Poseidon. All Legal Entitlements required in connection with Poseidon's performance of this Agreement will be obtained as and when required by Applicable Laws.

**16.5 No Litigation.** ~~As~~Except as set forth on Schedule 2.3.4, as of the Effective Agreement Date, there is no action, suit, proceeding or investigation pending or, to Poseidon's actual knowledge, threatened against Poseidon which, if adversely determined, would affect the validity of this Agreement.

**16.6 No Conflict.** The execution and performance of this Agreement by Poseidon does not breach or constitute a default by Poseidon under any law, regulation, ruling, court order,

agreement, indenture, certificate of preference, or undertaking or other instrument to which Poseidon is a party or by which Poseidon or any of its property may be bound or affected.

## **17. FORCE MAJEURE.**

**17.1 Defined.** "Force Majeure" as used herein means any act, event or condition affecting the Project, the District, Poseidon or any of the District's or Poseidon's respective subcontractors to the extent that it materially and adversely affects the ability of either Party to perform any obligation under this Agreement (except for payment obligations) as long as such act, event or condition is beyond the reasonable control of such Party and is not a result of the willful or negligent action of the Party relying thereon. Neither Party shall have any right to obtain reimbursement from the other Party for the costs of any Force Majeure event.

**17.2 Force Majeure Examples.** Acts or events constituting Force Majeure may include without limitation the following: (a) an act of God (but not including reasonably anticipated weather conditions for the geographic area of the Project), landslide, earthquake, fire, explosion, flood, sabotage or similar occurrence; (b) acts of a public enemy, extortion, war, blockade or insurrection, riot or civil disturbance; (c) the failure of any appropriate Governmental Authority or private utility to provide and maintain utilities; (d) strikes, lock outs, work stoppages or labor disputes (other than those of employees of Poseidon); (e) underground or latent conditions not known prior to the ~~date of this Agreement~~ Effective Date; (f) the presence at, on or under the Project of (i) subsurface structures, materials, or conditions having historical, geological, archaeological, religious or similar significance or (ii) any habitat of an endangered, environmentally sensitive, or protected species; (g) the presence of hazardous waste or biologically toxic substances at, on or under the Project unless caused by the Party claiming Force Majeure; (h) the inability to obtain influent water of sufficient quantity or quality; (i) a Change in Law that would materially and adversely affect the ability of either Party to perform any material obligation under this Agreement; (j) any denial of an application for or a delay in the review, issuance or renewal of, or the suspension, termination or interruption of, any permit or other governmental consent; ~~and~~ (k) a suspension of delivery of Product Water pursuant to Section 8-5.8.5; and (l) a planned or unplanned shutdown of the pipelines designated as "Pipeline 3" and "Pipeline 4" of the Authority's Second Aqueduct.

**17.3 Events Not Deemed Force Majeure.** It is specifically understood that, Section 17.2 notwithstanding, none of the following acts, events or conditions shall constitute a Force Majeure event: (a) strikes, lock outs, work stoppages or labor disputes of employees of Poseidon; (b) the failure of any subcontractor or supplier for any reason to furnish labor, materials, services (other than utility service) or equipment unless the failure results from a Force Majeure event affecting the subcontractor or supplier; (c) equipment failure (unless caused by a Force Majeure event); or (d) any denial of an application for or a delay in the review, issuance or renewal of, or the suspension, termination or interruption of, any permit or other governmental consent, if caused by Poseidon's failure to apply for or use commercially reasonable efforts to prosecute the application for such permit or governmental consent.

## **17.4 Excused Performance.**

**17.4.1 Occurrence of Force Majeure Event.** Upon the occurrence of a Force Majeure event which affects a Party to this Agreement, such Party shall be excused from its obligations under the Agreement (except for payment obligations) for the period during which it is unable to comply with such obligations as a result of the Force Majeure event.

**17.4.2 Notification and Mitigation.** Any excuse of obligations of a Party under this Agreement pursuant to Section 17.4.1 is subject to the proviso that, upon obtaining knowledge of a Force Majeure event such Party: (a) promptly notifies the other Party of such Force Majeure event; (b) provides reasonable details relating to such Force Majeure event; and (c) implements mitigation measures to the extent commercially reasonable.

**17.4.3 Extension of Term.** If Poseidon is unable to deliver, or Buyer is unable to accept, Product Water due to an event of Force Majeure, then, unless such Force Majeure event occurs during the last three hundred and sixty-five (365) days of the Term, the Party whose obligations hereunder are excused may, upon the giving of notice within one hundred eighty (180) days after the cessation of such event of Force Majeure, elect to extend the Term by the number of days such Party was unable to deliver or accept Product Water, as applicable, as a result of such event of Force Majeure.

## **18. RIGHT OF FIRST OFFER.**

**18.1 Restriction on Transfer.** Except as provided in ~~Section~~ Sections 9.2.4 and 21.16, Poseidon shall not voluntarily or involuntarily, by operation of law or otherwise, give, sell, assign, transfer, donate, pledge, mortgage, hypothecate or encumber (any such disposition is hereinafter referred to as "Transfer"), all or any portion of its interest in the Project (hereinafter a "Property Interest") without first complying with the provisions of Section 18.2 of this Agreement. Except as provided in Section 21.16, any purported Transfer of a Property Interest without compliance with the provisions of this Agreement shall be void and of no force or effect.

### **18.2 Right of First Offer.**

**18.2.1 Notice of Transfer.** If Poseidon desires to Transfer a Property Interest, Poseidon shall first give written notice (the "Request") to the District of Poseidon's desire to Transfer a Property Interest, requesting that the District provide Poseidon with an offer to purchase the Property Interest.

**18.2.2 District Offer.** The District shall be entitled, but not required, within ninety (90) days following delivery of the Request, to deliver a written offer (an "Offer") to Poseidon specifying the price and the other terms pursuant to which the District would be willing to purchase the Property Interest. Poseidon shall be entitled, but not obligated, to accept the Offer, within sixty (60) days after the delivery of the Offer (the "Acceptance Deadline") by sending a written acceptance of such Offer to the District ("Accepted Offer"). If Poseidon does not accept the Offer by the Acceptance Deadline, the Offer shall be deemed to have been rejected.

**18.2.3 Closing.** The closing of the Transfer of the Property Interest in accordance with an Accepted Offer shall be upon a mutually agreed date (but no later than ninety (90) days

following the Acceptance Deadline). The District shall deliver the purchase price at the closing and at or prior to the closing the Parties shall execute and deliver such other documents as are reasonably necessary to consummate the Transfer of the Property Interest upon the terms set forth in the Accepted Offer.

**18.2.4 Subsequent Transfer.** If after an Offer has been rejected or deemed rejected Poseidon desires to sell the Property Interest, Poseidon may, at any time within one hundred eighty (180) days after the Acceptance Deadline, Transfer such Property Interest to any third party upon terms (i) no less favorable in the aggregate as those contained in the rejected Offer or (ii) less favorable in the aggregate as those contained in the rejected Offer, subject to the District having ninety (90) days to elect to acquire the Property Interest on such less favorable terms. If a sale of the Property Interest does not occur within one hundred eighty (180) days after an Offer has been rejected or deemed rejected, Poseidon shall not consummate such sale without again complying with the provisions of this Section 18.2.

**19. DISPUTE RESOLUTION.** The Parties shall establish prior to the Commercial Operation Date, or sooner in the event a dispute arises prior to such a date, a dispute coordination committee (the "Committee") consisting of two (2) management representatives each from Poseidon and the District and an independent representative (the "Independent Representative"). The Independent Representative shall be mutually acceptable to both Parties and shall be a person either with (i) experience in the construction and operation of facilities such as the Project or (ii) such other qualifications as are relevant with respect to a particular dispute. The Parties may change the Independent Representative upon mutual agreement. The Parties shall provide written notice of appointment of their respective Committee representatives to the Independent Representative promptly following the date the Committee is established. If either Party's representatives change, such Party shall promptly notify the other Party and the Independent Representative of the change. The Committee shall meet as the circumstances may deem necessary to resolve any disputes under this Agreement. All disputes arising from this Agreement shall be submitted to the Committee for resolution as a condition precedent to seeking any other relief under this Agreement. The fees and expenses of the Independent Representative shall be shared equally by the Parties. If the procedures referenced in this Section do not result in resolution of the dispute within ten (10) business days after commencement of the Committee meeting: (a) the Parties, upon mutual agreement, may submit the dispute to binding or advisory arbitration for resolution in accordance with such procedures as are mutually agreed; or (b) either Party may commence legal action in a court of competent jurisdiction to enforce or interpret the terms of this Agreement. In the event that Poseidon determines that any dispute involves common questions of fact or law with a dispute under one or more of the other Water Purchase Agreements, Buyer may consent to a joinder to and a consolidated resolution of issues with respect to such dispute.

## **20. INDEMNITY.**

**20.1 District's Indemnity.** The District shall save, indemnify, hold harmless and defend (with counsel reasonably acceptable to Poseidon), Poseidon, its successors, assigns and affiliates, and their respective officers, directors, controlling persons (if any), employees, attorneys, agents, consultants and shareholders (the "Poseidon Indemnitees") from, against and in respect of any and all claims (including third party claims), suits, actions, proceedings (formal and

informal), investigations, judgments, deficiencies, damages, settlements and liabilities (collectively "Losses") as and when incurred by any of the Poseidon Indemnitees arising out of or based upon any breach or alleged breach of any express representation, warranty, covenant, or agreement of the District contained in this Agreement or in any document, instrument, or agreement executed and delivered by the Parties in connection herewith which specifically provides for the applicability of the indemnity provisions of this Agreement. The District shall not, however, be required to indemnify any of the Poseidon Indemnitees to the extent any Losses arise from or relate to the gross negligence or willful misconduct of any of the Poseidon Indemnitees.

**20.2 Poseidon's Indemnity.** Poseidon shall save, indemnify, hold harmless and defend (with counsel reasonably acceptable to the District), the District, its successors, assigns and affiliates, and their respective officers, directors, controlling persons (if any), staff members, employees, attorneys, agents and consultants (the "District Indemnitees") from, against and in respect of any and all Losses arising out of or based upon any breach or alleged breach of any express representation, warranty, covenant, or agreement of Poseidon contained in this Agreement or in any document, instrument, or agreement executed and delivered by the Parties in connection herewith which specifically provides for the applicability of the indemnity provisions of this Agreement. Poseidon shall not, however, be required to indemnify any of the District Indemnitees to the extent any Losses arise from or relate to the gross negligence or willful misconduct of any of the District Indemnitees.

**20.3 Indemnification Procedures.** Each Party's obligations with respect to this Section 20 are subject to the condition that the indemnified Party gives the indemnifying Party reasonably prompt notice of any Losses for which indemnification is sought hereunder. The indemnified Party shall cooperate in the defense of such claim (and pending assumption of defense, an indemnified Party may take such steps to defend against such claim as, in such indemnified Party's good faith judgment, are appropriate to protect its interests). The indemnifying Party shall pay such indemnified Party's reasonable out-of-pocket expenses incurred in connection with such cooperation. The indemnifying Party shall keep the indemnified Party reasonably informed as to the status of the defense of such claim. After notice from the indemnifying Party to an indemnified Party of the assumption, and the defense of a claim, the indemnifying Party shall not be liable to such indemnified Party for any legal or other expenses subsequently incurred by such indemnified Party in connection with the defense thereof other than those expenses referred to above. The indemnifying Party at the indemnifying Party's own expense and through counsel chosen by the indemnifying Party (which counsel shall be reasonably acceptable to the indemnified Party), shall defend any claim; provided, however, that if, in the indemnified Party's and the indemnifying Party's reasonable judgment at any time, either a conflict of interest arises between such indemnifying Party and the indemnified Party or if there are defenses which are different from or in addition to those available to the indemnifying Party and/or the indemnified Party and the representation of both parties by the same counsel would be inappropriate, then such indemnified Party shall have the right to employ one law firm as counsel, together with a separate local law firm in each applicable jurisdiction (if necessary) ("Separate Counsel"), to represent such indemnified Party in any action or group of related actions (which firm or firms shall be reasonably acceptable to the indemnifying Party), and in that event: (a) the reasonable fees and expenses of such Separate Counsel shall be paid by the indemnifying Party (it being understood, however, that the indemnifying Party shall not be liable for the expenses of more than one Separate Counsel

(excluding such local counsel referred to above) with respect to any claim (even if against multiple indemnified Parties)); and (b) the indemnifying Party shall have the right to conduct its own defense in respect of such claim. If the indemnifying Party does not defend against a claim, the indemnified Party may defend, compromise and settle such claim and shall be entitled to indemnification hereunder (to the extent permitted by this Agreement). Notwithstanding the foregoing, the indemnifying Party shall not, without the prior written consent of the indemnified Party (which consent shall not be unreasonably withheld, conditioned or delayed), settle or compromise any claim or consent to the entry of any judgment unless: (x) there is no finding or admission of any violation of law or any violation of the rights of any person and no effect on any other claims that may be made against the indemnified Party; and (y) the sole relief provided is monetary damages that are paid in full by indemnifying Party.

#### **20.4 Indemnification of MWD and the Authority.**

**20.4.1** Poseidon agrees at its sole cost and expense to protect, indemnify, defend, and hold harmless MWD, MWD's Board of Directors, officers, representatives, agents or employees from and against any and all claims and liability of any kind (including, but not limited to, any claims or liability for injury or death to any person, damage to property, natural resources or the environment, or water quality problems) that arise out of or relate to construction, operation, repair, or ownership of the Project. Such indemnity shall include all damages and losses related to any claim made, whether or not a court action is filed, and shall include attorneys' fees, administrative and overhead costs, engineering and consulting fees, and all other costs related to or arising out of such claim of liability.

**20.4.2** Poseidon agrees at its sole cost and expense to protect, indemnify, defend and hold harmless the Authority, the Authority's Board of Directors, officers, representatives, agents or employees from and against any and all claims and liability of any kind (including, but not limited to, any claims or liability for injury or death to any person, damage to property, natural resources or the environment, or water quality problems) that arise out of or relate to construction, operation, repair, or ownership of the Project. Such indemnity shall include all damages and losses related to any claim made, whether or not a court action is filed, and shall include attorneys' fees, administrative and overhead costs, engineering and consulting fees, and all other costs related to or arising out of such claim of liability.

#### **21. MISCELLANEOUS.**

**21.1 Further Actions.** At any time and from time to time after the date hereof, each Party agrees to take such actions and to execute and deliver such documents as the other Party may reasonably request to effectuate the purposes of this Agreement.

**21.2 Amendment.** Except as otherwise provided in this Agreement, neither this Agreement nor any provision hereof may be waived, modified, amended, discharged, or terminated except by an instrument in writing signed by the Party against which the enforcement of such waiver, modification, amendment, discharge or termination is sought, and then only to the extent set forth in such writing. The District hereby authorizes the Executive Manager, on the District's behalf, to enter into ministerial amendments to this Agreement. An amendment to this



Agreement shall be deemed ministerial if the City Attorney advises the Executive Manager in writing that a proposed amendment does not require special judgment or discretion and does not have a material adverse effect on any rights or obligations of the District under the Agreement. For example, by way of illustration and not by way of limitation, an amendment to the Agreement that extends a deadline or time for performance but does not impact any statute of limitations and does not waive any right or increase any burden of the District generally would be ministerial. After the Executive Manager so executes an amendment deemed ministerial, such amendment shall be submitted to the Board of Directors of the District for ratification within thirty (30) days following the date the Executive Manager executes such amendment; provided, however, that if the District Board of Directors fails to ratify such amendment, then it shall be deemed void and of no force or effect.

**21.3 Entire Agreement.** This Agreement constitutes the entire understanding among the Parties with respect to the matters set forth herein, and supersedes all prior or contemporaneous understandings or agreements among the Parties with respect to the subject matter hereof (including without limitation, the original Water Purchase Agreement dated September 28, 2004, and all eight amendments thereto entered into prior to the Agreement Date), whether oral or written.

**21.4 Notices.** Any notice, approval, consent, waiver or other communication required or permitted to be given or to be served upon any Party in connection with this Agreement shall be in writing. Such notice shall be personally served, sent by facsimile, sent prepaid by registered or certified mail with return receipt requested, or sent by reputable overnight delivery service, such as Federal Express, and shall be deemed given: (a) if personally served, when delivered to the Party to whom such notice is addressed; (b) if given by facsimile, when sent, provided that the confirmation sheet from the sending fax machine confirms that the total number of pages were successfully transmitted; (c) if given by prepaid or certified mail with return receipt requested, on the date of execution of the return receipt; or (d) if sent by reputable overnight delivery service, such as Federal Express, when received. Such notices shall be addressed to the Party to whom such notice is to be given at the address specified below or as such Party shall otherwise direct in writing to the other Parties delivered or sent in accordance with this Section. The “copy to” notice to be given as set forth below is a courtesy copy only; a notice given to such person is not sufficient to effect giving a notice to the principal Party, and a failure to give such a courtesy copy of a notice does not constitute a failure to give notice to the principal Party.

If to District, to:

Carlsbad Municipal Water District  
5950 El Camino Real  
Carlsbad, CA 92008  
Attn: General Manager  
Fax No. (760) 431-1601

With a copy to:

City of Carlsbad  
1200 Carlsbad Village Drive  
Carlsbad, CA 92008  
Attn: City Attorney

Fax No. (760) 434-8367

If to Poseidon, to:

Poseidon Resources (Channelside) LLC  
501 West Broadway, Suite 840 ~~2020~~  
San Diego, CA. 92101  
Attn: President  
Fax No. (619) 595-7892

**21.5 Controlling Law.** This Agreement shall be governed by, and construed and interpreted in accordance with, the laws of the State of California, without giving effect to any choice-of-law or conflicts-of-laws rule or principle that would result in the application of any other laws.

**21.6 Headings.** Headings, titles and captions are for convenience only and shall not constitute a portion of this Agreement or be used for the interpretation thereof.

**21.7 Cumulative Rights; Waiver.** The rights created under this Agreement, or by law or equity, shall be cumulative and may be exercised at any time and from time to time. No failure by any Party to exercise, and no delay or omission on the part of any Party in exercising any rights, shall be construed or deemed to be a waiver thereof, nor shall any single or partial exercise by any Party preclude any other or future exercise thereof or the exercise of any other right. Any waiver of any provision or of any breach of any provision of this Agreement must be in writing, and any waiver by any Party of any breach of any provision of this Agreement shall not operate as or be construed to be a waiver of any other breach of that provision or of any breach of any other provision of this Agreement. The failure of any Party to insist upon strict adherence to any term of this Agreement on one or more occasions shall not be considered or construed or deemed a waiver of any provision or any breach of any provision of this Agreement or deprive that Party of the right thereafter to insist upon strict adherence to that term or provision or any other term or provision of this Agreement.

**21.8 Liberal Construction.** This Agreement constitutes a fully-negotiated agreement among commercially sophisticated Parties, each assisted by legal counsel, and the terms of this Agreement shall not be construed or interpreted for or against any Party hereto because that Party or its legal representative drafted or prepared such provision.

**21.9 Severability.** If any provision of this Agreement shall be ruled invalid, illegal or unenforceable, then the Parties shall: (a) promptly negotiate a substitute for such provision which shall, to the greatest extent legally permissible, therein effect the intent of the Parties in such invalid, illegal or unenforceable provision; and (b) negotiate such changes in, substitutions for or additions to the remaining provisions of this Agreement as may be necessary in addition to and in conjunction with clause (a) above to give effect to the intent of the Parties without the invalid, illegal or unenforceable provision. To the extent that the Parties are able to negotiate such changes, substitutions or additions as set forth in the preceding sentence, and the intent of the Parties with

respect to the essential terms of the Agreement may be carried out without the invalid, illegal or unenforceable provision, then the balance of this Agreement shall not be affected, and this Agreement shall be construed and enforced as if such invalid, illegal or unenforceable provision did not exist.

**21.10 Good Faith and Fair Dealing.** The Parties hereto acknowledge and agree that the performances required by the provisions of this Agreement shall be undertaken in good faith, and with all Parties dealing fairly with one another.

**21.11 No Third Party Beneficiaries.** Subject to Section 20, this Agreement does not create, and shall not be construed to create, any rights enforceable by any person, partnership, corporation, joint venture, limited liability company or other form of organization or association of any kind that is not a party to this Agreement; provided, however, that: (i) MWD and the Authority are third party beneficiaries of Sections 9.5.2(b) through (e), Section 20.4 and Section 21.23 and (ii) any Secured Party will be a third party beneficiary of Article 22.

**21.12 Execution in Counterparts; Facsimile Signatures.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The signature page of any counterpart may be detached therefrom without impairing the legal effect of the signature(s) thereon, provided such signature page is attached to any other counterpart identical thereto except for having an additional signature page executed by the other Party. Each Party agrees that the other Party may rely upon the facsimile signature of a Party on this Agreement as constituting a duly authorized, irrevocable, actual, current delivery of this Agreement as fully as if this Agreement contained the original ink signature of the Party supplying a facsimile signature.

**21.13 Time of the Essence.** Time is of the essence of each and every provision of this Agreement. Unless business days are expressly provided for, all references to "days" herein shall refer to consecutive calendar days. If any date or time period provided for in this Agreement is or ends on a Saturday, Sunday or federal, state or legal holiday, then such date shall automatically be extended to the next day which is not a Saturday, Sunday or federal, state or legal holiday.

**21.14 Authority.** Each Party shall deliver to the other Party copies of such resolutions, certificates or written assurances evidencing authorization to execute, deliver and perform this Agreement.

**21.15 Number, Gender.** Where a word or phrase is defined in this Agreement, its other grammatical forms have a corresponding meaning. As used herein, and as the circumstances require, the plural term shall include the singular, the singular shall include the plural, the neuter term shall include the masculine and feminine genders, the masculine term shall include the neuter and the feminine genders, and the feminine term shall include the neuter and the masculine genders.

**21.16 Assignment.**

**21.16.1 Assignment by Poseidon.** Except as otherwise specifically permitted by Section 18 and this Section 21.16, neither this Agreement nor any of the rights, interests, or obligations hereunder may be assigned by Poseidon without the District's prior written consent, which consent may be withheld in the District's sole discretion. Poseidon shall not assign its rights under this Agreement to any third party if such third party would not be obligated to comply with Applicable Laws with respect to its ownership and operation of the Project. Poseidon shall transfer its rights and obligations under this Agreement to any transferee of Poseidon's rights with respect to the Project.

**21.16.2 Financing Assignments.** Poseidon may, without the consent of the District make such assignments as are necessary to create security interests for the financing of any of its obligations under this Agreement with bona fide third party lenders in bona fide loan transactions. In the event of such an assignment by Poseidon the District shall furnish such information, consents, certificates, opinions of counsel and other documentation or assistance related to this Agreement as is reasonable and customary and mutually agreed by the Parties. Such consents shall include an undertaking by Poseidon's lenders not to terminate this Agreement as long as the District continues to perform its obligations hereunder and to cooperate with the District in any exercise by the District of its rights under Section 14.2.2.

**21.16.3 Assignment by the District.** Neither this Agreement nor any of the rights, interests, or obligations hereunder may be assigned by the District without Poseidon's prior written consent, which consent may be withheld in Poseidon's sole discretion. As a condition to Poseidon's consent to such assignment, Poseidon shall have the right to negotiate changes to the terms of this Agreement with the District's assignee, including but not limited to changes to provisions addressing: (i) differences between the Base Price and the Avoided Water Cost, (ii) termination events, (iii) testing and responsibility for water distribution systems, (iv) the Delivery ~~Point~~Points and the Appurtenant Facilities; (v) the conditions to the District's obligations to purchase Product Water and (vi) defaults and remedies.

**21.16.4 General.** Any assignment of this Agreement or any of the rights, interests, or obligations hereunder shall be of no force or effect until the proposed assignee agrees in writing to be bound by all of the terms and conditions of this Agreement and such signed writing is delivered to the non-assigning party.

**21.16.5 Inurement.** Subject to the foregoing restrictions, the provisions of this Agreement shall be binding upon and inure to the benefit of all affiliates, subsidiaries, assigns, and successors-in-interest of the Parties. Without limiting the generality of the foregoing, the voluntary or involuntary dissolution of Poseidon or any merger, reorganization or consolidation where Poseidon is not the surviving or resulting entity, or any transfer by Poseidon of all or substantially all of its assets shall be deemed to be an assignment within the meaning of this Section. In such event, provided the District consents to any such voluntary or involuntary dissolution, merger, reorganization, consolidation, or transfer of assets, the surviving or resulting district, authority, agency, corporation, partnership, limited partnership, joint venture, limited liability company, public entity or other form of organization or association to which such assets shall be transferred or which is carrying on the business of Poseidon shall be obligated to perform Poseidon's obligations hereunder.

**21.17 Relationship.** Poseidon is an independent contractor and the relationship between the Parties shall be limited to performance of this Agreement in accordance with its terms. Neither Party shall have any responsibility with respect to the services to be provided or contractual benefits assumed by the other Party. Nothing in this Agreement shall be deemed to constitute either Party a partner, agent or legal representative of the other Party. No liability or benefits, such as workers' compensation, pension rights or liabilities, other provisions or liabilities arising out of or related to a contract for hire or employer/employee relationship, shall arise or accrue to any Party's agent or employee as a result of this Agreement or its performance.

**21.18 Reimbursement**~~21.18 — Agreement Not a Discretionary Approval.~~ The execution of this Agreement and its performance prior to the date on which the Project has been approved under CEQA, (the "Approval Date") (if and when such date shall occur) shall not be deemed or construed to constitute any discretionary approval of the Project or any part thereof that is required from the City, the District or the RDA. ~~The District shall file a Notice of Exemption under CEQA for the execution of this Agreement prior to the Approval Date, and shall file a Notice of Determination under CEQA for the District as responsible agency under CEQA, if and when the Approval Date shall occur.~~ Poseidon agrees to reimburse the District for any legal fees and costs incurred by or awarded against the District in connection with any third party claim or suit challenging the District's actions under CEQA with respect to the Project to the same extent Poseidon is obligated to reimburse the City for such amounts pursuant to that certain agreement between the City and Poseidon dated January 21, 2004.

**21.19 Financing of the Project.** Poseidon agrees that it will not incur indebtedness secured by the Project in excess of (i) with respect to the initial financing of the Project, the projected cost of the Project as of the date such indebtedness is incurred and (ii) with respect to any subsequent financing of the Project, the greater of: (A) the fair market value of the Project as of the date such indebtedness is incurred and (B) the cost of the Project as of the Commercial Operation Date.

**21.20 Project and Site Devoted to Public Use.** This Agreement grants certain contractual rights to the District, including but not limited to the right to purchase Product Water from Poseidon, the right of first offer described in Section 18 of this Agreement, and the right to exercise the options described in Sections 2 and 14.2.2 of this Agreement. The Parties intend by the grant of these rights to devote the Project and Poseidon's interest in the Site to public use by the City and the District to the extent of the Contract Capacity, under the terms and conditions of this Agreement. The fact that the Project and the Site have been appropriated to public use by the City and the District to the extent provided herein shall not give the City or the District any additional rights not specifically set forth in this Agreement, but instead reflects the District's independent judgment that this Agreement and Poseidon's use of the Site is integral to the District's public purpose of providing water to District and City residents. The rights the District has established under this Agreement result in the Project, the Site and Poseidon's interest in the Site being "appropriated to public use by a local public entity [(the City and the District)]" for the purposes of California Code of Civil Procedure § 1240.660.

**21.21 Recordation of Agreement.** The Parties shall record this Agreement.

**21.22 Security.** As security for its obligations under this Agreement, including without limitation Sections 6.2, 7.1, 7.2.3, 8.2, 8.5, 9.7, 10.2, 12.2 and 20.2 hereof, prior to the Commercial Operation Date Poseidon shall obtain and maintain an irrevocable, standby letter of credit (or such other form of security reasonably acceptable to the District) in the amount of Two Million Five Hundred Thousand Dollars (\$2,500,000). If such security (the “Security”) is provided in the form of a letter of credit (the “LOC”), such LOC shall: (a) be issued by a financial institution (i) having an investment grade long-term, unsecured senior debt rating from Standard & Poor's Corporation or Moody's Investors Service, Inc. or (ii) is otherwise reasonably acceptable to the District; (b) name the District as beneficiary; (c) have a minimum term of one (1) year; (d) automatically extend for not less than six (6) months unless the issuing financial institution provides at least thirty (30) days prior written notice of termination or non-renewal to the District; (e) provide for the District to make drawings thereon: (i) after the occurrence of a Poseidon Event of Default, in the amount of any finally adjudicated amount payable to the District under this Agreement by Poseidon or (ii) in the full amount of the LOC in the event the issuing financial institution provides the notice of termination or non-renewal described in clause (d) above and (f) otherwise be in form and substance reasonably acceptable to the District. The District shall return the Security to Poseidon contemporaneously with any termination of this Agreement pursuant to Section 14.2.2. If Poseidon fails to obtain the Security as required by this Section 21.22, or if Poseidon fails to replenish the amount of such Security after a drawing thereon resulting from a Poseidon Event of Default, then the District, upon written notice to Poseidon, may suspend deliveries of Product Water.

**21.23 Intellectual Property.** Poseidon shall provide to MWD, in writing, a non-exclusive license without time limit authorizing MWD and each of its member public agencies and subagencies to use at no additional cost or payment to Poseidon any intellectual property resulting from or developed in the course of development, design, construction, or operation of the Project. The intellectual property subject to this provision includes, without limitation, rights under Patent No. US 6,946,081 B2 Sep 20, 2005, but excludes trade secrets of persons or entities other than the Parties. Such license shall only be assignable in connection with the use of such intellectual property for projects owned by MWD or its member agencies and subagencies in their respective service territories.

**21.24 MWD and Authority Contribution Agreements.**

**21.24.1** “MWD Contribution Agreement” shall mean that certain Seawater Desalination Program Agreement No. 70025, to be entered into by and among MWD, the Authority and the Water Purchasers and “Authority Contribution Agreement” shall mean the agreement to be entered into by and among the Authority and the Water Purchasers with respect to the Authority Incentive.

**21.24.2** Upon Poseidon's request, Buyer will use commercially reasonable efforts to assist Poseidon (at Poseidon's cost and expense) in disputing any determination made by MWD which would reasonably be expected to reduce the amount of the MWD Incentive, provided that Buyer has a right to dispute such determination pursuant to the MWD Contribution Agreement.

21.24.3 Upon Poseidon's request, Buyer will use commercially reasonable efforts to assist Poseidon (at Poseidon's cost and expense) in disputing any determination made by the Authority which would reasonably be expected to reduce the amount of the Authority Incentive, provided that Buyer has a right to dispute such determination pursuant to the Authority Contribution Agreement.

## **22. LENDER PROTECTIONS.**

**22.1** **Terms Generally.** For the purposes of this Article 22, the following terms have the meanings specified below:

"Amendment" has the meaning assigned to such term in Section 22.10.

"Annual Financial Information" means the financial information or operating data with respect to Buyer, provided at least annually, in the same format as the Audited Financial Statements Buyer makes publicly available.

"Audited Financial Statements" means Buyer's annual consolidated financial statements, prepared in accordance with GAAP as prescribed by GASB, which consolidated financial statements shall have been audited by an independent auditor or firm of independent auditors as shall be then retained by Buyer.

"Bonds" means any tax-exempt or taxable bonds issued to finance the Project.

"Cure Period" means, with respect to any Poseidon Default, the period during which Poseidon could have cured a Poseidon Default pursuant to the terms of this Agreement; provided, that with respect to a Poseidon Default pursuant to Sections 14.1.3, 14.1.4 or 14.1.5, the Cure Period shall extend for 30 days after the last day Poseidon could have cured such Poseidon Default pursuant to the terms of this Agreement; provided further that (i) if the Secured Party is prohibited from curing any such non-monetary default by any process, stay or injunction issued by any governmental authority or pursuant to any bankruptcy or insolvency or other similar proceeding involving Poseidon or (ii) if performance obligations under this Agreement have been suspended because of Force Majeure, then the time periods specified herein for curing a default shall be extended for the period of such prohibition or Force Majeure.

"Default Notice" has the meaning assigned to such term in Section 22.3.3.

"Discharge Date" means the date on which all of the obligations of Poseidon under the Financing Agreements have been irrevocably discharged in full to the satisfaction of the Secured Party.

"Financing Agreements" means agreements relating to the indebtedness for the Project for which Poseidon has pledged its interest under this Agreement to the Secured Party as further described in Section 22.2.1.

"GAAP" means generally accepted accounting principles as prescribed by the GASB.

“GASB” means the Governmental Accounting Standards Board.

“MSRB” has the meaning assigned to such term in Section 22.2.8.

“Poseidon Default” means any occurrence, circumstance or event, or any combination thereof, which with the lapse of time, the giving of notice or both, would constitute a Poseidon Event of Default.

“Revival Date” has the meaning assigned to such term in Section 22.8.

“Secured Party” means any lender providing construction, interim or long-term financing to Poseidon for the Project, and any trustee or agent acting on its behalf.

“Senior Creditors” means the Secured Party and any other lender, agent or underwriter under the Financing Agreements and their respective successors and assigns.

“Step-in Date” has the meaning assigned to such term in Section 22.6.1.

“Step-in Notice” has the meaning assigned to such term in Section 22.5.1.

“Step-in Party” has the meaning assigned to such term in Section 22.5.2.

“Step-in Period” means the period from and including the Step-in Date until the earlier of:

(a) the Substitution Effective Date;

(b) the Step-out Date;

(c) the date of termination of this Agreement by Buyer in accordance with this Agreement; and

(d) the date falling 24 months after the Step-in Date, subject to an extension equal to any period of Force Majeure in such 24 month period during which performance obligations under this Agreement were suspended.

“Step-out Date” means the date upon which any Step-out Notice becomes effective.

“Step-out Notice” has the meaning assigned to such term in Section 22.6.5.

“Substitute Accession Agreement” means the agreement to be entered into by a Substituted Entity pursuant to Section 22.7.3.

“Substitution Effective Date” has the meaning assigned to such term in Section 22.7.4.

“Substituted Entity” means a person designated as a successor to Poseidon pursuant to Section 22.7.



“Substitution Notice” has the meaning assigned to such term in Section 22.7.1.

## **22.2 Agreements and Consent to Security.**

**22.2.1 Consent to Assignment of Project Agreement.** Without limiting the effect of Section 21.16.2, in order to secure Poseidon’s obligations to the Senior Creditors under the Financing Agreements, Buyer hereby consents to the pledge and assignment of, and the granting of the lien and security interest in, all of Poseidon’s right, title and interest in and under this Agreement to the Secured Party. Poseidon shall provide the District written notice of the name and address of the Secured Party, which notice shall contain the Secured Party’s agreement to comply with the terms of this Article 22. No more than three (3) times during a calendar year, Buyer agrees to execute such other acknowledgements of this security interest, as the Secured Party may request and as are reasonably acceptable to Buyer.

**22.2.2 Payments under Project Agreement.** Buyer shall pay all amounts payable by it under, in connection with, or in respect of, this Agreement in the manner and as and when required by this Agreement directly to such person, entity or account as shall be specified from time to time by the Secured Party to Buyer in writing. Notwithstanding the foregoing, if any entity or person has become a Substituted Entity pursuant to the terms hereof, then Buyer shall pay all such amounts directly to such Substituted Entity or an account designated in writing by the Substituted Entity. Poseidon acknowledges and agrees to the payment provisions of this Section 22.2.2 notwithstanding anything to the contrary set forth in this Agreement.

**22.2.3 No Poseidon Default; No Buyer Consent Required.** Notwithstanding anything in this Agreement to the contrary, Buyer agrees that (i) the pledge and assignment of, and the granting of the lien and security interest in, all of Poseidon’s right, title and interest in and under this Agreement and in all other property owned by Poseidon (or as to which title has vested in Poseidon under this Agreement) which is in the possession of Buyer pursuant to this Agreement in order to secure Poseidon’s obligations under the Financing Agreements, and (ii) the execution and delivery by Poseidon and its affiliates of the Financing Agreements and any other related security documents and performance of their respective obligations thereunder, in each case, shall neither constitute a Poseidon Default nor does any such action require the consent of Buyer, other than as provided in Section 22.2.1.

**22.2.4 Opinion of Counsel; Closing Certificates.** Upon Poseidon providing the District written notice of the name and address of the Secured Party pursuant to Section 22.2.1, Buyer shall deliver an opinion of counsel and closing certificate, addressed to the Secured Party, and the other Senior Creditors in substantially the forms attached hereto as Schedules 22.2.4A and 22.2.4B and such other secretary’s or officer’s certificates that are reasonably requested by the underwriter of Bonds in connection with certain information of Buyer included in the offering document prepared in connection with the sale of any Bonds and the execution and delivery of this Agreement.

**22.2.5 Right of First Offer Acknowledgment.** Buyer acknowledges its rights under Sections 18.1 and 18.2 do not apply with respect to the pledge and assignment of this

Agreement as described in Section 22.2.1 or the exercise by the Senior Creditors of their rights of cure, acceleration, foreclosure and enforcement of liens under the Financing Agreements.

**22.2.6 Estoppel Certificates.** Not more than three times during a calendar year, at the request of the Secured Party, Buyer shall promptly certify in writing (A) the absence of (i) to Buyer's knowledge, any Poseidon Default and (ii) any District Event of Default or (B) if any Poseidon Default or District Event of Default has occurred and is continuing at such time as Buyer is required to deliver a certification pursuant to this Section 22.2.6, a description of the circumstances relating to such Poseidon Default or District Event of Default.

**22.2.7 Agreements Concerning MWD and Authority Contribution Agreements.** Until the Discharge Date, Buyer agrees that it shall:

(a) comply in all material respects with the terms of each of the MWD Contribution Agreement (unless Buyer agrees that the amount by which the MWD Incentive is reduced or eliminated as a result of such non-compliance shall continue to be deemed to have been received by Buyer for the purposes of calculating the Avoided Water Cost) and the Authority Contribution Agreement; and

(b) promptly forward to the Secured Party any notice of default or notice to terminate the MWD Contribution Agreement or the Authority Contribution Agreement it receives from MWD or the Authority, as applicable.

**22.2.8 Continuing Disclosure.**

(a) The Buyer shall, while any Bonds are outstanding, provide the Annual Financial Information on or before the date which is 270 days after the end of each fiscal year of Buyer (the "Report Date") to the Municipal Securities Rulemaking Board (the "MSRB") in an electronic format accompanied by identifying information as prescribed by the MSRB. The consolidated financial statements included in each submission of Annual Financial Information shall be prepared in accordance with GAAP. Buyer shall include with each submission of Annual Financial Information a written statement to the effect that (i) the Annual Financial Information is the Annual Financial Information required by this Agreement, (ii) such information complies with the applicable requirements of this Agreement and (iii) Buyer has provided such information to the MSRB in accordance with the terms of this Agreement. If Buyer changes its fiscal year, it shall provide written notice of the change of fiscal year to the MSRB.

(b) If not provided as part of the Annual Financial Information, Buyer shall provide the Audited Financial Statements to the MSRB when and if available while any Bonds are outstanding.

**22.3 Rights of Secured Party.**

**22.3.1 Exercise of Rights.** Buyer agrees that (i) until the Discharge Date the Secured Party shall have the right (but not the obligation), in the exercise of the Secured Party's rights and remedies pursuant to the Financing Agreements and any other related security documents, upon written notice to Buyer, to make, subject to the terms of this Agreement, all

demands, give all notices, and, to the extent specifically permitted herein, take all actions and exercise all rights of Poseidon under this Agreement and (ii) in such event Buyer shall continue to perform its obligations under this Agreement to the extent its obligated to do so under the terms hereof. The exercise by the Secured Party of any of its rights under this Section 22.3.1 shall not result in the assumption by any Senior Creditor of any of Poseidon's obligations under this Agreement.

**22.3.2 Buyer Consideration of Notices.** Upon receipt of any Step-in Notice or Substitution Notice delivered by the Secured Party pursuant to Section 22.5.1 or Section 22.7.1, Buyer shall give full effect to such notice in accordance with the terms of this Article 22.

**22.3.3 Default Notice.** Buyer shall give the Secured Party any written notice of default it provides to Poseidon under this Agreement (each, a "Default Notice") at the same time it delivers such notice to Poseidon.

## **22.4 Actions During Cure Period.**

**22.4.1 Buyer Forbearance During Cure Period.** Prior to the expiration of any Cure Period, Buyer agrees not to:

(a) suspend its performance (including in connection with any insolvency or bankruptcy proceeding in relation to Poseidon) under this Agreement;

(b) exercise cure or step-in rights; provided, however Buyer may exercise its Step-In Right under Section 14.2.3 unless the Secured Party has used all commercially reasonable efforts to re-commence (or cause the re-commencement of) the operation of the Project pursuant to this Article 22 within seven (7) days after Buyer notifies the Secured Party that Buyer intends to exercise such Step-In Right;

(c) terminate or give notice terminating this Agreement or exercise any remedies available to it under this Agreement; or

(d) take or join any action for the liquidation, bankruptcy, administration, receivership, reorganization, dissolution or winding up of Poseidon or for the composition or readjustment of Poseidon's debts, or any similar insolvency procedure in relation to Poseidon, or for the appointment of a receiver, trustee, custodian, sequestrator, conservator, liquidator, administrator or similar official for Poseidon or for any part of Poseidon's property;

provided that such agreement of Buyer shall not prevent Buyer from taking actions which are permitted under Section 14.2 of this Agreement on a Revival Date in respect of any Poseidon Default which has occurred and has not been remedied or waived as of such Revival Date. In addition to the foregoing, Buyer agrees not to terminate this Agreement for Poseidon's failure to diligently prosecute a cure of a Poseidon Default under Section 14.1.4 of this Agreement without giving the Secured Party 30 days prior written notice of such intent to terminate this Agreement and if the Secured Party commences to diligently cure such Poseidon Default within such 30 day period then Buyer shall not terminate this Agreement for such Poseidon Default for so long as the Secured Party diligently prosecutes such cure to completion.

**22.4.2 Right to Cure.** During any Cure Period, without giving a Step-in Notice, the Secured Party shall have the right (but shall have no obligation), at its sole option and discretion, to perform or arrange for the performance of any act, duty, or obligation required of Poseidon under this Agreement, or to cure any default of Poseidon hereunder which performance or cure shall be accepted by Buyer in lieu of performance or cure by Poseidon and in satisfaction of Poseidon's obligations under this Agreement. To the extent that any Poseidon Default is cured and/or any payment liabilities or performance obligations of Poseidon are performed during the Cure Period as provided in this Section 22.4.2, such action shall discharge the relevant liabilities or obligations of Poseidon to Buyer. For the avoidance of doubt, (i) the exercise of cure rights by the Secured Party under this Section 22.4.2 shall not abrogate Poseidon's rights or obligations under this Agreement except to the extent required in connection with the relevant cure, and (ii) the Buyer shall owe its obligations under this Agreement to Poseidon.

## **22.5 Step-in Notice.**

**22.5.1 Step-in Notice.** The Secured Party may give a written notice (a "Step-in Notice") under this Section 22.5.1 to Buyer at any time in which it (i) certifies that it is entitled to deliver a Step-in Notice pursuant to the terms of the Financing Agreements or any other related security document and (ii) states that such notice is a "Step-in Notice" being delivered pursuant to this Section 22.5.1.

**22.5.2 Step-in Party.** The Secured Party shall appoint in the Step-in Notice, a step-in party to serve as the appointed representative of the Senior Creditors (the "Step-in Party") for purposes of exercising the rights and discharging the obligations of the Step-in Party under Section 22.6. If the Step-in Period extends more than three (3) months, the Step-in Party must be approved by Buyer, provided Buyer shall not reject or disapprove a Step-in Party unless it reasonably determines that the Step-in Party is not capable of performing Poseidon's obligations under this Agreement.

## **22.6 Rights and Obligations Upon Step-in; Step-out.**

**22.6.1 Certain Rights of Step-in Party.** On and from the date of the receipt of the Step-in Notice and the approval by Buyer of the appointment of the Step-in Party if required by Section 22.5.2 (such date, the "Step-in Date") and during the Step-in Period, the Step-in Party shall:

(a) be entitled to exercise and enjoy the rights and powers expressed to be assumed by or granted to Poseidon under this Agreement; and

(b) be liable for the performance of all of Poseidon's obligations under this Agreement arising on or after the Step-in Date.

**22.6.2 Certain Undertakings of Buyer during Step-in Period.** During a Step-in Period, Buyer shall owe its obligations under this Agreement to the Step-in Party, provided that:

(a) the receipt of, or performance by Buyer in favor of, such Step-in Party shall be a good and effective discharge of Buyer's obligations under this Agreement;

(b) the Secured Party shall be entitled at any time by notice in writing to Buyer to direct (such direction being binding on the Secured Party, Buyer and Poseidon) that, at all times during the Step-in Period, the Step-in Party shall be solely entitled to make any decisions, to give any directions, approvals or consents, to receive any payments or otherwise to deal with Buyer under this Agreement;

(c) any amount due from Poseidon to Buyer under this Agreement as of the Step-in Date and notified to such Step-in Party prior to the Step-in Date shall have been paid to Buyer on the Step-in Date, failing which Buyer shall be entitled to exercise its rights under this Agreement in respect of the amount so due and unpaid; and

(d) the Step-in Party shall cure any default of Poseidon that is susceptible of cure or be in the process of diligently prosecuting such cure.

**22.6.3 Effect of Cure by Step-in Party.** To the extent that any default of Poseidon under this Agreement is cured and/or any payment liabilities or performance obligations of Poseidon are performed during the Step-in Period pursuant to Section 22.6.1, such action shall discharge the relevant liabilities or obligations of Poseidon to Buyer.

**22.6.4 Poseidon Bound by Actions of Step-in Party.** Poseidon agrees to be bound by all dealings between Buyer and the Step-in Party to the same extent as if they had been between Buyer and Poseidon. For the avoidance of doubt, the exercise of step-in rights by the Secured Party under this Section 22.6 shall not abrogate Poseidon's rights or obligations under this Agreement except to the extent required in connection with the relevant step-in nor shall such exercise expand Buyer's obligations under this Agreement.

**22.6.5 Step-out Notice.** A Step-in Party may, at any time, by providing not less than sixty (60) days' prior written notice ("Step-out Notice") to Buyer terminate its obligations to Buyer under this Article 22, in which event such Step-in Party shall be released from all obligations under this Article 22 except for any obligation or liability of the Step-in Party arising on or before the Step-out Date. The obligations of Buyer to the Step-in Party under this Agreement shall also terminate on the Step-out Date.

## **22.7 Substitution Proposal by the Senior Creditors.**

**22.7.1 Substitution Notice.** At any time the Secured Party may deliver a written notice (a "Substitution Notice") to Buyer under this Section 22.7.1 in which it (x) certifies that it is entitled to deliver a Substitution Notice pursuant to the terms of the Financing Agreements or any other related security document, and identifies in reasonable detail why the notice is being delivered (y) states that such notice is a "Substitution Notice" being delivered pursuant to this Section 22.7.1 and (z) states that it intends to designate a Substituted Entity.

**22.7.2 Information regarding Substituted Entities.** The Secured Party shall, as soon as practicable after its delivery of the Substitution Notice, provide to Buyer certified copies

of its organizational documents and evidence that the Substituted Entity has been duly formed and is validly existing under the laws of its jurisdiction of incorporation or organization and such other information as Buyer may reasonably request for the purpose of evaluating whether such entity is capable of replacing Poseidon under this Agreement.

**22.7.3 Grounds for Rejection of Proposed Substituted Entity.** Buyer shall notify the Secured Party in writing whether it has approved such proposed Substituted Entity within 30 days following delivery by the Secured Party of the information referred to in Section 22.7.2. Buyer shall not reject or disapprove a proposed Substituted Entity unless it reasonably determines that the proposed Substituted Entity is not capable of performing Poseidon's obligations under this Agreement.

**22.7.4 Substitution Procedure.** If Buyer approves a proposed Substituted Entity, such Substituted Entity shall execute a duly completed Substitute Accession Agreement substantially in the form attached hereto as Schedule 22.7.4 and submit it to Buyer and such agreement shall become effective on and from the date on which Buyer countersigns the Substitute Accession Agreement (the "Substitution Effective Date").

**22.7.5 Effect of Substitution.** On and from the Substitution Effective Date:

(a) such Substituted Entity shall become a party to this Agreement in place of Poseidon and Poseidon shall be immediately released from its obligations arising under, and cease to be a party to, this Agreement from the Substitution Effective Date;

(b) all of Poseidon's obligations and liabilities under this Agreement arising on and after the Substitution Effective Date shall be immediately and automatically transferred to the Substituted Entity;

(c) such Substituted Entity shall exercise and enjoy the rights and perform the obligations of Poseidon under this Agreement;

(d) Buyer shall owe its obligations (including, without limitation, any undischarged liability in respect of any loss or damage suffered or incurred by Poseidon prior to the Substitution Effective Date) under this Agreement to such Substituted Entity in place of Poseidon; and

(e) Subject to 22.7.7, any right of termination suspended by virtue of this Article 22 shall be of no further effect and Buyer shall not be entitled to terminate or suspend performance of this Agreement by virtue of any act, omission or circumstance occurring prior to such Substitution Effective Date.

**22.7.6 Buyer Reasonable Efforts.** Buyer shall use its reasonable efforts to facilitate the transfer to the Substituted Entity of Poseidon's obligations under this Agreement.

**22.7.7 Conditions to Substitution Effective Date.** On or prior to the Substitution Effective Date, the Substituted Entity shall pay to Buyer any amount owed by Poseidon to Buyer under this Agreement as of the Substitution Effective Date and cure any default

of Poseidon that is susceptible of cure or be in the process of diligently prosecuting such cure. Buyer shall notify the Substituted Entity in writing of the amount of such costs and expenses and any unremedied default reasonably in advance of the Substitution Effective Date.

**22.8 Exercise of Buyer Remedies after Revival Date.** If a Default Notice has been given, the grounds for that notice are continuing and have not been remedied or waived and the Cure Period relating thereto ends and no Substituted Entity becomes a party to this Agreement, then, on and from the date such Cure Period expires (the "Revival Date"), Buyer shall be entitled to: (i) act upon any and all grounds for termination or suspension available to it in relation to this Agreement in respect of Poseidon Defaults not remedied or waived; and (ii) pursue any and all claims and exercise any and all remedies against Poseidon.

**22.9 New Project Agreement.** If this Agreement is rejected by a trustee or debtor-in-possession in, or terminated as a result of, any bankruptcy or insolvency proceeding involving Poseidon and, within 60 days after such rejection or termination, the Secured Party (or any Substituted Entity satisfying the requirements of this Article 22 if directed to do so by the Secured Party) shall so request and shall certify in writing to Buyer that it intends to perform the obligations of Poseidon as and to the extent required under this Agreement, Buyer will execute and deliver to the Secured Party (or any Substituted Entity satisfying the requirements of this Article 22 if directed to do so by the Secured Party) a new water purchase agreement. Such new water purchase agreement shall contain conditions, agreements, terms, provisions and limitations which are the same as those of this Agreement, except for any obligations that have been fulfilled by Poseidon or Buyer prior to such rejection or termination.

**22.10 Consent to Assignment or Amendment of Project Agreement.** Until the Discharge Date, Buyer shall not (i) consent to any assignment, transfer, pledge or hypothecation of this Agreement or any interest therein by Poseidon (an "Assignment"), or (ii) enter into any novation, amendment, waiver, consent or modification of this Agreement (an "Amendment"), unless the: (x) Secured Party has been given 30 days prior written notice of the proposed Assignment or Amendment and Buyer has, within such 30 day period, not received written notice from the Secured Party that Assignment or Amendment is not permitted under the Financing Agreements or (y) Buyer has received written confirmation from Poseidon that such Assignment or Amendment is permitted under the Financing Agreements.

**22.11 Notice and Cure.** Buyer shall be entitled to the notice and cure rights set forth in Section 14.3.3 with respect to any failure to observe or perform the provisions of this Article 22.

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IN WITNESS WHEREOF, this Agreement has been executed as of the date and year first above set forth.

"District"  
~~"District"~~

"Poseidon"

Carlsbad Municipal Water District, a  
municipal water district

Poseidon Resources (Channelside) LLC, a  
~~Delaware limited liability company~~

By: \_\_\_\_\_

By: \_\_\_\_\_

Its: \_\_\_\_\_

Its: \_\_\_\_\_



## ACKNOWLEDGMENTS

STATE OF \_\_\_\_\_ )  
 )  
COUNTY OF \_\_\_\_\_ ) ss.

On \_\_\_\_\_, ~~2004,2010~~, before me, the undersigned, a notary public in and for said State, personally appeared \_\_\_\_\_, ~~personally known to me (or~~who proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

\_\_\_\_\_  
Notary Public in and for said State

STATE OF \_\_\_\_\_ )  
 )  
COUNTY OF \_\_\_\_\_ ) ss.

On \_\_\_\_\_, ~~2004,2010~~, before me, the undersigned, a notary public in and for said State, personally appeared \_\_\_\_\_, ~~personally known to me (or~~who proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

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Notary Public in and for said State

**Schedule 1**

**Site Description**

See Exhibits A through JK-1 attached hereto

**[To come]**

**Schedule 2.3.1A**  
**Corrosion Pilot Study**  
**Executive Summary**

**Schedule 2.3.1B**

**Evaluation of Proposed Irrigation of Water Quality on Carlsbad Landscapes**

**Executive Summary**

**Schedule 2.3.4**

**Proceedings**

Surfrider Foundation v. California Regional Water Quality Control Board, San Diego Region, et al., Case No. 37-2008-00091983-CU-WM-CTL.

Surfrider Foundation v. California State Lands Commission, Case No. 37-2008-00092607-CU-WM-CTL.

Coastal Environmental Rights Foundation v. City of Carlsbad, Case No. 37-2010-00061008-CU-TT-NC.

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**Schedule 3**  
**Purchase Price**

**1. Adjustments to Base PriceCharge**

(a) **Adjustment.** Commencing at the beginning of the first Water Year and thereafter at the end of each calendar quarter during the Term, the Base PriceCharge in effect for the upcoming calendar quarter (Base PriceCharge<sub>i</sub>) shall be adjusted as follows:

$$\text{Base PriceCharge}_i = \text{Base PriceCharge}_{\text{Initial}} \times ((70\% \times (\text{CPI}_i \div \text{CPI}_{\text{Initial}})) + (30\% \times (\text{EC}_i \div \text{EC}_{\text{Initial}})))$$

Where:

Base PriceCharge<sub>Initial</sub> = the Base PriceCharge as determined pursuant to Section 3.1.1 of the Agreement (excluding any adjustment pursuant to this Schedule 3)

CPI<sub>i</sub> = the most recently published value of the CPI as of the first day of calendar quarter<sub>i</sub>

~~CPI<sub>Initial</sub> = the most recently published value of the CPI as of the Effective Date~~205.3

CPI = the Consumer Price Index, All Urban Consumers (CPI-U) (1982-84 = 100) for the San Diego MSA published by the Bureau of Labor Statistics of the United States Department of Labor

EC<sub>i</sub> = the ~~average~~total cost ~~(weighted by the Project's use of electricity) of electricity used by incurred by Poseidon to run the Project (expressed in \$/MWH) for the calendar quarter<sub>i-1</sub> divided by the total amount of the electricity used to run the Project (expressed in MWH) for the calendar quarter<sub>i-1</sub>, provided, however, that for the first adjustment of the Base Price pursuant to this Agreement, EC<sub>i</sub> shall be equal to EC<sub>Initial</sub> x (CPI<sub>i</sub>/CPI<sub>Initial</sub>)~~

EC<sub>Initial</sub> = \$60/MWH

~~Solely for illustrative purposes, a hypothetical example of the calculation of the Base Price as of the beginning of the third Water Year is set forth as Attachment A to this Schedule 3.~~

(b) **Change in Index.** If a substantial change is made in the manner in which the CPI is calculated, then the CPI will be adjusted to the figure that would have been used had the manner of computing the CPI in effect at the date of this Agreement not been altered. If the CPI (or a successor or substitute index) is not available, a reliable governmental or other nonpartisan publication evaluating the information used in determining the CPI will be used. No adjustments will be made due to any revision that may be made in the CPI for any month.

(c) **Statements.** Within thirty (30) days after the commencement of a Water Year, Poseidon shall prepare and provide to ~~the District Buyer~~ for its review a statement of any<sup>8</sup>

adjustment to the Base ~~Price~~Charge made pursuant to this Schedule 3.

(d) **No Decreases.** In no event shall the Base ~~Price~~Charge be reduced as a result of adjustments made pursuant to this Schedule 3.

## **2. Avoided Water Cost**

(a) **Components.** The Avoided Water Cost for any given month (the "Billing Month") shall equal the sum of: (i) the SDCWA Price (defined in Paragraph 2(b) below), (ii) the Other Avoided Charges (defined in Paragraph 2(c) below) ~~and~~, (iii) the ~~Subsidy~~MWD Incentive, ~~and/or (iv) any other new or additional third party financial support for the District~~Buyer's purchase of Product Water which the District actually receives, (including, without limitation the Authority Incentive and any other financial support provided under the Authority Contribution Agreement for Buyer's purchase of Product Water) which is payable to Buyer (or deemed payable to Buyer pursuant to Section 2(e) of this Schedule 3) either in cash or credit, for the applicable Water Year.

~~(b) **SDCWA Price.** As used herein, "SDCWA Price" shall mean: the sum of all of the amounts, whether now or hereafter imposed and however now or hereafter delineated, named or identified, and whether or not such amounts vary with the amount of water supplied (with any fixed amounts converted to an applicable per acre foot amount), that the San Diego County Water Authority (the "Authority") charges or would charge the District to supply and transport water to the District; excluding, however all of the amounts, whether now or hereafter imposed and however now or hereafter delineated, named or identified, that the District is required to pay the Authority, after the Commercial Operation Date, to maintain the right to receive water from the Authority regardless of whether it purchases any water therefrom.~~

(b) **SDCWA Price.** As used herein, "SDCWA Price" shall, subject to Section 2(d) of this Schedule 3, mean the sum of the following charges for the Billing Month:

(i) **Melded M&I Supply Rate.** The rate adopted by the Authority in effect for the Billing Month.

(ii) **Melded M&I Treatment Rate.** The rate adopted by the Authority in effect for the Billing Month.

(iii) **Transportation Rate.** The rate adopted by the Authority in effect for the Billing Month times (A) the quantity of Product Water sold to Buyer for the Billing Month for which Buyer has not incurred such rate divided by (B) the quantity of all Product Water sold to Buyer for the Billing Month.

(iv) **Customer Service Charge (CSC).** The CSC shall be calculated for each Billing Month as follows:

CSC per acre-foot=

((Authority's per acre-foot CSC x Three year average annual purchase of Product Water) ÷ 12) ÷ (the Product Water Amount)) x (the Product Water sold to Buyer for the Billing Month for which Buyer has not incurred the Authority's per acre-foot CSC divided by all Product Water sold to Buyer for the Billing Month);



provided, however, that if the Product Water Amount is zero, the CSC per acre-foot shall be equal to zero and if the Product Water Amount is greater than zero but less than one acre-foot, the Product Water Amount for the purpose of this calculation shall be equal to one acre-foot.

Where

Authority's per acre-foot CSC =

Authority's total CSC ÷ Three year Average Deliveries for all Authority member agencies

and

Three year average annual purchase of Product Water is the average annual purchase of Product Water by all Water Purchasers within the three prior fiscal years (as defined below); and

The "Product Water Amount" shall be equal to the total amount of Product Water sold to all the Water Purchasers pursuant to all of the Water Purchase Agreements for the Billing Month, expressed in acre-feet, including Undelivered Water for which each Water Purchaser is obligated to make payment pursuant to its Water Purchase Agreement; and

Authority's total CSC is the total CSC that the Authority allocates to its member agencies for the calendar year containing the Billing Month; and

Three year Average Deliveries for all Authority member agencies is the average annual total of deliveries made by the Authority to its member agencies over three prior fiscal years and used by the Authority to allocate each member agency's share of the Authority's total CSC; and

Three prior fiscal years are the specific three fiscal years of the Authority ending prior to the calendar year containing the Billing Month that the Authority uses to determine average deliveries to each of its member agencies in order to allocate the Authority's total CSC.

The Authority's total CSC and Total 3-year Average Deliveries for all Authority member agencies are currently contained in Table 2 of the Authority's annual ordinance setting rates and charges for the calendar year.

(v) Storage Charge. The Storage Charge shall be calculated for each Billing Month as follows:

Storage Charge per acre-foot=

((Authority's per acre-foot Storage Charge x Three year Average annual purchase of Product Water) ÷ 12) ÷ (the Product Water Amount); provided, however, that if the Product Water Amount is zero, the Storage Charge per acre-foot shall be equal to zero and if the Product Water Amount is greater than zero but less than one acre-foot, the Product Water Amount for the purpose of this calculation shall be equal to one acre-foot.

Where

Authority's per acre-foot Storage Charge =

Authority's total Storage Charge ÷ Three year Average Deliveries for all Authority member agencies

Authority's total Storage Charge is the total Storage Charge that the Authority allocates to its member agencies for the calendar year containing the Billing Month; and

Three year Average Deliveries for all Authority member agencies is the average annual total of deliveries made by the Authority to its member agencies over three prior fiscal years and used by the Authority to allocate each member agency's share of the Authority's total Storage Charge; and

Three prior fiscal years are the specific three fiscal years of the Authority ending prior to the calendar year containing the Billing Month that the Authority uses to determine average deliveries to each of its member agencies in order to allocate the Authority's total Storage Charge; and The Authority's total Storage Charge and Total 3-year Average Deliveries for all Authority member agencies are currently contained in Table 3 of the Authority's annual ordinance setting rates and charges for the calendar year.

(vi) MWD Readiness-to-Serve Charge (RTS Charge). The RTS Charge shall be calculated for each Billing Month as follows:

RTS Charge per acre-foot =

((Authority's per acre-foot RTS Charge x Ten year average annual purchase of Product Water) ÷ 12) ÷ (the Product Water Amount); provided, however, that if the Product Water Amount is zero, the RTS Charge per acre-foot shall be equal to zero and if the Product Water Amount is greater than zero but less than one acre-foot, the Product Water Amount for the purpose of this calculation shall be equal to one acre-foot.

Where

Authority's per acre-foot RTS Charge =

Authority's total RTS Charge ÷ Ten year average deliveries for all Authority member agencies

and

Ten year average annual purchase of Product Water is the average annual purchase of Product Water by all Water Purchasers within the ten prior fiscal years as defined below; and

Authority's total RTS Charge is the total RTS Charge that the Authority is assessed by MWD before any MWD standby charge credits are applied, for the fiscal year containing the Billing Month; and

Ten year average deliveries for all Authority member agencies is the average annual total of deliveries made by the Authority to its member agencies over ten prior fiscal years and used by the Authority to allocate each member agency's share of the Authority's total RTS Charge before any MWD standby charge credits are applied; and

Ten prior fiscal years are the specific ten fiscal years of the Authority ending prior to the fiscal year containing the Billing Month that the Authority uses to determine average deliveries to each of its member agencies in order to allocate the Authority's total RTS Charge.

The Authority's total RTS Charge and Total 10-year Average Deliveries for all Authority member agencies are currently contained in Table 5 of the Authority's annual ordinance setting rates and charges for the calendar year.

(vii) MWD Capacity Charge. The MWD Capacity Charge shall be calculated for each Billing Month as follows:

Avoided MWD Capacity Charge per acre-foot =

(Authority's peak week charge per acre-foot x Average peak week purchase of Product Water) ÷ 12 ÷ (the Product Water Amount); provided, however, that if the Product Water Amount is zero, the Avoided MWD Capacity Charge per acre-foot shall be equal to zero and if the Product Water Amount is greater than zero but less than one acre-foot, the Product Water Amount for the purpose of this calculation shall be equal to one acre-foot.

where

Authority's peak week charge per acre-foot =

Authority's total MWD Capacity Charge ÷ Five year average peak week deliveries for all Authority member agencies

and

Average peak week purchase of Product Water is the average of peak week purchases of Product Water by all Water Purchasers within the five peak weeks contained in the five prior calendar years as defined below; and

Peak week means the coincident peak week as determined by the Authority; and

Authority's total MWD Capacity Charge is the capacity charge that the Authority is assessed by the MWD for the calendar year containing the Billing Month; and

Five year average peak week deliveries for all Authority member agencies is the average annual total of coincident peak week deliveries made by the Authority to its member agencies over Five prior calendar years and used by the Authority to allocate each member agency's share of the Authority's total MWD Capacity Charge; and

Five prior calendar years are the specific five calendar years ending prior to the calendar year containing the Billing Month that the Authority uses to determine the average share of coincident peak week deliveries for each of its member agencies in order to allocate the Authority's total MWD Capacity Charge.

The Authority's total MWD Capacity Charge and 5 years of coincident peak week deliveries to the Authority's member agencies are currently contained in Table 4 of the Authority's annual ordinance setting rates and charges for the calendar year. This information is used to calculate **Total 5-year average peak week** deliveries for all Authority member agencies.

(c) **Other Avoided Charges.** As used herein, "Other Avoided Charges" shall mean: the sum of all of the amounts (without duplication of any components of the SDCWA Price), whether now or hereafter imposed or otherwise incurred and however now or hereafter delineated, named or identified, and whether or not such amounts vary with the amount of water supplied (with any fixed amounts converted to an applicable per acre-foot amount), that (i) any entity other than the Authority charges or would charge the ~~District Buyer~~ to supply and transport water to the ~~District Buyer~~ or (ii) are otherwise not incurred by the ~~District Buyer~~ from such other entity as a result of its purchase of Product Water hereunder; excluding, however (x) all of the amounts, whether now or hereafter imposed and however now or hereafter delineated, named or identified, that the ~~District Buyer~~ is required to pay to such other entity, after the Commercial Operation Date, to maintain the right to receive water from such other entity regardless of whether

it purchases any water therefrom; and (y) all capital expenditures not incurred by the District as a result of its purchase of Product Water hereunder. Buyer shall provide Poseidon reasonably detailed calculations of Other Avoided Charges, if any, within [twenty (20)] days after the end of a Billing Month.

(d) **Adjustment of SDCWA Price.** If a change is made in the Authority's or MWD's water rate structure or the methodology used by the Authority or MWD to determine its water rates (collectively, a "Rate Structure Change") which materially lowers the SDCWA Price, then the SDCWA Price will be subject to an appropriate adjustment so that the SDCWA Price as so adjusted will be substantially the same as the SDCWA Price had the Rate Structure Change not occurred. If the SDCWA Authority ceases to exist, then the SDCWA Price shall thereafter be based on a rate of the then-largest agency, other than the State of California, delivering and selling water at wholesale to retail agencies in San Diego County, and the Parties shall negotiate in good faith to agree on such substitute rate, which shall reflect water cost information substantially equivalent to the SDCWA Price in effect just prior to SDCWA Authority's cessation of existence.

(e) **MWD Incentive.** In the event that the MWD Incentive is reduced or the MWD Contribution Agreement is terminated with respect to a party or all parties thereto as a result of any action or omission of Buyer (excluding any such action or omission resulting from a failure of Poseidon to perform any obligation undertaken by Poseidon with respect to the MWD Contribution Agreement), then for the purpose of calculating the Avoided Water Cost Buyer shall be deemed to have received the MWD Incentive in an amount determined assuming no such action or omission had occurred. The Parties acknowledge and agree that actions or omissions of representatives of Buyer in their capacity as as members of the Board of Directors of the MWD shall not constitute actions or omissions of Buyer for the purposes of this paragraph.

(f) **Authority Incentive.** In the event that the Authority Incentive is reduced or the Authority Contribution Agreement is terminated with respect to a party or all parties thereto as a result of any action or omission of Buyer (excluding any such action or omission resulting from a failure of Poseidon to perform any obligation undertaken by Poseidon with respect to the Authority Contribution Agreement), then for the purpose of calculating the Avoided Water Cost Buyer shall be deemed to have received the Authority Incentive in an amount determined assuming no such action or omission had occurred. The Parties acknowledge and agree that actions or omissions of representatives of Buyer in their capacity as as members of the Board of Directors of the Authority shall not constitute actions or omissions of Buyer for the purposes of this paragraph.

### **3. Tracking Account.**

(a) **Additions to Tracking Account.** If during all or any portion of a Water Year the Billing Month the Base Price is greater than the Avoided Water Cost, then at the end of such Water Year an amount shall be added to a nominal tracking account (the "Tracking Account") for the Billing Month based on the difference between (i) the Base Price and such (ii) the Avoided Water Cost, as follows:

(Base Price minus the Avoided Water Cost) times (the number of acre-feet of Product Water sold to ~~the District in such Water Year or during the portion of such~~

~~Water Year that the Base Price exceeded the Avoided Water Cost, as applicable, Buyer in the Billing Month including Product Water deemed to be sold pursuant to Section 9.8).~~

(b) **Deductions from Tracking Account.** If during ~~all or any portion of a Water Year~~the Billing Month the Avoided Water Cost is greater than the Base Price and the balance of the Tracking Account ~~is~~was greater than zero (0) ~~at the end of the previous Billing Month,~~ the following amount (the “Deferred Payment”) ~~shall be deducted from the Tracking Account~~ (up to the total balance of the Tracking Account) shall be included in the invoice for the ~~last month of such Water Year~~Billing Month and shall be paid by ~~the District~~Buyer to Poseidon:

(Avoided Water Cost minus Base ~~Price~~Charge) times (the number of acre-feet of Product Water sold to ~~the District in such Water Year or during the portion of such Water Year that the Avoided Water Cost exceeded the Base Price, as applicable~~Buyer in such month, including Product Water deemed to be sold pursuant to Section 9.8), but in no event will the Deferred Payment exceed the Tracking Account balance.

(c) **Other Tracking Account Provisions.** If at the expiration of the Term the balance of the Tracking Account is greater than zero (0), Poseidon’s rights with respect to the Tracking Account shall terminate; provided however, that if ~~the District~~Buyer has exercised its Purchase Option, the balance of the Tracking account shall be paid to Poseidon by ~~the District~~Buyer in addition to the Purchase Option Price.

(d) **Recordkeeping.** As part of the invoice for the last Billing Month in a calendar quarter, Poseidon shall provide Buyer a report of Tracking Account additions, deductions and balances for such calendar quarter. Discrepancies shall be reconciled as mutually agreed by the Parties at the end of each Water Year.

4. **Additional Payment.** If during ~~all or any portion of a Water Year~~the Billing Month the Avoided Water Cost is greater than the Base Price and either: (i) the balance of the Tracking Account is zero (0) (taking into account~~was zero (0) at the end of the previous Billing Month or (ii) the balance of the Tracking Account in the current Billing Month is reduced to zero (0) as a result of any deductions from the Tracking Account for such Water Year~~Billing Month pursuant to Paragraph 3(b) above), then in either case a payment (the “Additional Payment”) equal to fifty percent (50%) of the following amount shall be included in the invoice for the ~~last month of such Water Year~~Billing Month and shall be paid by ~~the District~~Buyer to Poseidon:

((Avoided Water Cost minus Base Price) times (the number of acre-feet of Product Water sold to ~~the District in such Water Year or during the portion of such Water Year that the Avoided Water Cost exceeded the Base Price, as applicable~~Buyer in the Billing Month, including Product Water deemed to be sold pursuant to Section 9.8)) minus (any Deferred Payment for ~~such Water Year~~the Billing Month).

Attachment A

5. **Delivery Charge.** The Delivery Charge for the Billing Month shall be equal to the sum of: (i) Main Capital Charge, (ii) the Carlsbad Capital Charge divided by the Contract Quantity of Buyer for the Billing Month, plus (ii) (A) the sum of the Operating Charge, the Electricity Charge, and the Administrative Real Estate Charge (as defined below) divided by (B) the aggregate Contract

Quantities of all Water Purchasers for the Billing Month.

(a) Main Capital Charge and Carlsbad Capital Charge

The Main Capital Charge shall be equal to \$324.78/acre-foot. The Carlsbad Capital Charge for the Billing Month shall be equal to \$1,000,000, and shall be prorated as necessary for the Billing Months in which the Commercial Operation Date or the end of the Term of this Agreement occurs. The Main Capital Charge and the Carlsbad Capital Charge shall each be increased by 2.5% at the beginning of each calendar year following the Agreement Date. The amounts of the Main Capital Charge and the Carlsbad Capital Charge are based on estimated Delivery Facilities Capital Costs (as defined below) of \$194,651,000.

In the event that the actual Delivery Facilities Capital Costs (excluding the cost of the Additional Facilities Design) are higher or lower than \$193,651,000, the Main Capital Charge shall be adjusted to equal (i) \$324.78/acre-foot times (ii) the actual Delivery Facilities Capital Costs (excluding the cost of the Additional Facilities Design) divided by \$193,651,000.

In the event that the actual costs of the Additional Facilities Design are higher or lower than \$1,000,000, the Carlsbad Capital Charge shall be adjusted to equal (i) \$1,000,000 times (ii) the actual costs of the Additional Facilities Design divided by \$1,000,000.

The Delivery Facilities Capital Costs shall be equal to all costs incurred or reimbursed by Poseidon associated with the design (including the Additional Facilities Design), engineering, construction, testing, installation, equipping, assembly, inspection, completion and start-up of the Delivery Facilities and the acquisition and preparation of the Appurtenant Facilities Rights of Way (as defined below) incurred prior to the Commercial Operation Date, including, without limitation: (a) all amounts payable for state taxes on equipment, costs incurred for design, right of way acquisition and preparation, manufacturing, construction, project management, installation, testing, and costs incurred for power relating to construction and start-up; (b) financing, advisory, legal and other fees associated with the Delivery Facilities, including any engineer-related consulting fees; (c) all other Delivery Facilities-related costs, development costs (including all costs payable to any person, including landowners or any Governmental Authority related to the Appurtenant Facilities Rights of Way), insurance costs, construction management services fees and expenses and expenses to complete the design, construction and financing of the Delivery Facilities; (d) interest, fees and expenses incurred on or in respect of any financing of the Delivery Facilities prior to the Commercial Operation Date; (e) costs associated with insurance and taxes; and (f) amounts payable for permitting and all project development fees and expenses incurred by Poseidon. "Appurtenant Facilities Rights of Way" means all easements, licenses, rights of way and other interests in real property acquired by Poseidon between the Site and the Delivery Points for the siting of the Appurtenant Facilities. Notwithstanding the foregoing the Delivery Facilities Capital Costs shall only include \$2,500,000 for the costs of the Storage Facilities (provided that such limitation shall not affect the amount of Allocated Costs described in the next paragraph which constitute part of the Delivery Facilities Capital Costs).

Attachment A to this Schedule 3 sets forth a summary of the estimated Delivery Facilities Capital Costs as of the Agreement Date. The Parties acknowledge and agree that of the costs set

forth under "Allocated Costs" on Attachment A (including the actual amount of such costs, when known) 30.2% shall constitute part of the Delivery Facilities Capital Costs.

Prior to the commencement of construction of the Delivery Facilities, Poseidon shall provide a reasonably detailed itemization of (i) the Delivery Facilities Capital Costs incurred prior to the date of such itemization, and (ii) an estimate of the remaining Delivery Facilities Capital Costs. The Parties shall meet to discuss such itemization within thirty (30) days after Buyer's receipt thereof. Any dispute over whether such items constitute Delivery Facilities Capital Costs shall be resolved pursuant to Section 19. The amounts of such itemization (as finally adjusted to reflect the resolution of any dispute) shall constitute Delivery Facilities Capital Costs and shall be further adjusted only as set forth in the following paragraph.

Upon completion of construction of the Delivery Facilities, the Delivery Facilities Capital Cost will be adjusted to reflect any difference between the estimated items provided pursuant to the previous paragraph and the actual costs incurred for such items.

(b) Operating Charge

The Operating Charge for the Billing Month shall be equal to all costs incurred or reimbursed by Poseidon for the Billing Month for the operation and maintenance of the Delivery Facilities or any portion thereof (other than electricity costs and right of way costs) and for the purchase of goods and services in connection therewith, including, without limitation: (a) premiums for insurance policies; (b) the costs of consumables; (c) costs of obtaining any other materials, supplies, utilities or services for the Delivery Facilities; (d) costs of maintaining, renewing and amending Legal Entitlements; (e) franchise, licensing, property, real estate, sales and excise taxes; (f) general and administrative expenses; (g) employee salaries, wages and other employment-related costs; (h) business management and administrative service fees; (i) costs required to be paid to satisfy any Applicable Law or obtain or maintain any Legal Entitlement; (j) legal, accounting and consulting fees and other transaction costs and all other fees payable to Poseidon's lenders; (k) necessary capital expenditures; and (l) all other fees and expenses necessary for the continued operation and maintenance of the Delivery Facilities, including amounts paid to any operator of the Delivery Facilities. To the extent that such costs are incurred for the Project as a whole, 30% of such costs will be included in the Operating Charge.

(c) Electricity Charge.

The Electricity Charge for the Billing Month shall be equal to: (i) all fixed and variable costs of electricity incurred or reimbursed by Poseidon in the Billing Month to run the Project, times (ii) (A) the amount of electricity used by the Pump Station in the Billing Month divided by (B) the amount of electricity used by the Project (including the Pump Station) in the Billing Month.

(d) Administrative Real Estate Charge.

The Administrative Real Estate Charge for the Billing Month shall be equal to all amounts incurred or reimbursed by Poseidon in the Billing Month for costs payable to any grantor of any of the Appurtenant Facilities Rights of Way to the extent such costs are nominal and intended to



compensate such grantor for the administration of the terms of the grant of such Appurtenant Facilities Rights of Way.

## **6. Non-Administrative Real Estate Charge**

The Non-Administrative Real Estate Charge for the Billing Month shall be equal to the sum of the following:

(a)(i) all amounts incurred or reimbursed by Poseidon in the Billing Month for costs payable to any person, including landowners, or any Governmental Authority, related to any Appurtenant Facilities Rights of Way, excluding amounts included in the Administrative Real Estate Charge, if such amounts are incurred as a result of Product Water being transported through Delivery Facilities in such Appurtenant Facilities Rights of Way for either Buyer or Buyer and one or more other Water purchasers divided by (ii) the aggregate Contract Quantities of Buyer and such other Water Purchasers, if any, for the Billing month; and

(b)(i) all amounts incurred or reimbursed by Poseidon in the Billing Month for costs payable to any person, including landowners, or any Governmental Authority, related to any Appurtenant Facilities Rights of Way, excluding amounts included in the Administrative Real Estate Charge and amounts included in paragraph (a) above, divided by (ii) the aggregate Contract Quantities of all Water Purchasers for the Billing Month.

**7. Sample Calculation.** Solely for illustrative purposes, a hypothetical example of the calculation of the Purchase Price is set forth below:

- a) Base Price Calculation
- b) Avoided Water Cost Sample Calculation
- c) Purchase Price Sample Calculations

**a) Base Price Sample Calculation\***

\*The below calculations are for demonstrative purposes only in order to provide a sample monthly calculation. Actual numbers may vary.

Assumptions:

**Example: Cumulative adjustment through the beginning of the third Water Year of 7% January 2010**

---

**Base Price<sub>Initial</sub> Charge**

(Base Charge<sub>Initial</sub> x ((70% x (CPI<sub>i</sub> ÷ CPI<sub>Initial</sub>)) + (30% x (EC<sub>i</sub> ÷ EC<sub>Initial</sub>)))

Base Charge<sub>Initial</sub> = \$861/acre-foot

CPI<sub>i</sub> = 219.7243.7

CPI<sub>Initial</sub> = 205.3

EC<sub>i</sub> = \$64.2094.2/MWH

EC<sub>Initial</sub> = \$60/MWH

Base Price<sub>Charge i</sub> = \$861/acre-foot x ((70% x (219.7243.7 ÷ 205.3)) + (30% x (\$64.2094.2/MWH ÷ \$60/MWH)))

= \$921.361120.96/acre-foot

---

**Delivery Charge**

i. Main Capital Charge = \$324.78/acre-foot

ii. Carlsbad Capital Charge ÷ Carlsbad Contract Quantity

Carlsbad Capital Charge (total) = \$7,754

Carlsbad Contract Quantity = 1,250 acre-feet

Carlsbad Capital Charge = (\$7,754 ÷ 1,250) = \$6.20/acre-foot

iii.

Operating Charge = \$180,666

Electricity Charge = \$573,750

Admin. Real Estate Charge = \$0

A) Total = \$180,666 + \$573,750 + \$0 = \$754,416

B) Aggregate Contract

Quantities for all Water

Purchasers for the month = 4,666 acre-feet

A ÷ B = \$754,416 ÷ 4,666 = \$161.68/acre-foot

Total Delivery Charge = \$324.78 + \$6.20 + \$161.68

= \$492.66/acre-foot

---

**Total Base Price**

(Base Charge + Delivery Charge) = \$1120.96 + \$492.66

---

---

$$= \underline{\underline{\$1613.62/\text{acre-foot}}}$$

---

**b) Avoided Water Cost Sample Calculation\***

\*The below calculations are for demonstrative purposes only in order to provide a sample monthly calculation. Actual numbers may vary.

**Example Calculation for February 2015**

**San Diego Water Authority Charges**

---

i) Melded M&I Supply Rate = \$830.00/acre-foot

---

ii) Melded M&I Treatment Rate = \$335.00/acre-foot

---

iii) Transportation Rate

Authority Transportation Rate = \$95.00/acre-foot

Product Water Sold to Buyer

Which has not incurred the

Authority Transportation Rate = 500 acre-feet

Product Water Sold to Buyer = 1,250 acre-feet

Transportation Rate = \$95.00 x (500 ÷ 1,250)

= \$38.00/acre-foot

---

iv) Customer Service Charge (CSC)

A = Authority's per acre-foot CSC

B = Three year annual average purchase of Product Water by all Buyers during the three prior fiscal years

C = monthly Product Water Amount (by all buyers)

D = monthly Product Water Sold to Buyer which has not incurred the Authority's per acre-foot CSC

E = monthly Product Water sold to Buyer

CSC per acre-foot = (((A x B) ÷ 12) ÷ C) x (D ÷ E)

Water Authority's Total CSC = \$23,000,000 (for calendar year 2015, as set by Authority Board of Directors)

---

Three-year Average Annual

Deliveries for all Water Authority

Member Agencies = 600,000 acre-feet (from Authority's Table 2)

|   |   |  |
|---|---|--|
| A | = | $\$23,000,000 \div 600,000 = \$38.33/\text{acre-foot}$ |
| B | = | $(0 + 0 + 56,000) \div 3 = 18,667.7 \text{ acre-feet}$ |
| C | = | 4,666 acre-feet  |
| D | = | 500 acre-feet  |
| E | = | 1,250 acre-feet  |

$$\text{Customer Service Charge (CSC)} = (((\$38.33 \times 18,667.7) \div 12 \text{ months}) \div 4,666) \times (500 \div 1,250) =$$


---


$$\mathbf{\$5.11/\text{acre-foot}}$$


---

v) Storage Charge

A = Authority's per acre-foot Storage Charge

B = Three year annual average purchase of Product Water during the three prior fiscal years

C = monthly Product Water Amount

$$\text{Storage Charge per acre-foot} = ((A \times B) \div 12) \div C$$

$$\text{Authority's total Storage Charge} = \$65,000,000 \text{ (for calendar year 2015, as set by Authority Board of Directors)}$$


---

Three-year Average Annual

Deliveries for all Water Authority

$$\text{Member Agencies} = 555,000 \text{ acre-feet (from Authority's Table 3)}$$

|   |   |   |
|---|---|---|
| A | = | $\$65,000,000 \div 555,000 = \$117.12/\text{acre-foot}$ |
| B | = | $(0 + 0 + 56,000) \div 3 = 18,667.7 \text{ acre-feet}$  |
| C | = | 4,666 acre-feet   |

$$\text{Storage Charge} = ((\$117.12 \times 18,667.7) \div 12 \text{ months}) \div 4,666$$


---


$$\mathbf{\$39.05/\text{acre-foot}}$$


---

vi) MWD Readiness-to-Serve Charge (RTS Charge)

A = Authority's per acre-foot RTS Charge

B = Ten year annual average purchase of Product Water by all Buyers during the ten prior fiscal years

C = monthly Product Water Amount (by all buyers)

$$\text{RTS Charge per acre-foot} = ((A \times B) \div 12) \div C$$

$$\text{Authority's total RTS} = \$32,000,000 \text{ (for fiscal year 2015, as set by MWD)}$$


---

Ten-year Average Annual Deliveries

$$\text{for all Authority member agencies} = 512,000 \text{ acre-feet (from Authority's Table 5)}$$

|   |   |  |
|---|---|--|
| A | = | $\$32,000,000 \div 512,000 \text{ acre-feet} = \$62.50/\text{acre-foot}$ |
| B | = | $(0+0+0+0+0+0+0+0+0+56,000) \div 10 = 5,600 \text{ acre-}$               |

$$C = \frac{\text{feet}}{4,666 \text{ acre-feet}}$$

$$\text{Avoided RTS Charge} = \frac{((\$62.50 \times 5,600) \div 12) \div 4,666}{\text{acre-foot}} = \underline{\underline{\$6.25/\text{acre-foot}}}$$


---

vii) MWD Capacity Charge

A = Authority's peak week Capacity Charge per acre-foot

B = Average peak week purchase of Product Water by all buyers subject to Capacity Charges

C = monthly Product Water Amount (by all buyers subject to Capacity Charges)

$$\text{MWD Capacity Charge per acre-foot} = ((A \times B) \div 12) \div C$$

Authority's total MWD Capacity

Charge = \$11,000,000 (for calendar year 2015, as set by MWD)

Five-year average peak week

Deliveries for all Authority

Member agencies = 14,500 acre-feet (from Authority's Table 4)

$$A = \$11,000,000 \div 14,500 \text{ acre-feet} = \$758.62/\text{acre-foot}$$

$$B = (0+0+0+900+925) \div 5 = 365 \text{ acre-feet}$$

$$C = 4,666 \text{ acre-feet}$$

$$\text{MWD Capacity Charge} = ((\$758.62 \times 365) \div 12) \div 4,666$$

$$= \underline{\underline{\$4.95/\text{acre-foot}}}$$

$$\text{Total Avoided SDCWA Charges} = \$830.00 + \$335.00 + \$38.00 + \$5.11 + \$39.05 +$$

$$\underline{\underline{\$6.25 + \$4.95}}$$

$$= \underline{\underline{\$1,258.36}}$$


---

$$\text{MWD Incentive} = \underline{\underline{\$250/\text{acre-foot}}}$$


---

$$\text{Authority Incentive} = \underline{\underline{\$127/\text{acre-foot}}}$$


---

$$\text{Total Avoided Water Cost} = \$1,258.36 + \$250.00 + \$127.00$$

$$= \underline{\underline{\$1,635.36/\text{acre-foot}}}$$


---

**c) Purchase Price Sample Calculations (\$/AF)\***

\*The below calculations are for demonstrative purposes only in order to provide a sample monthly calculation. Actual numbers may vary.

---

**Example 1: Base Price > Avoided Water Cost**

|                                       |   |                          |
|---------------------------------------|---|--------------------------|
| Base Price                            | = | \$1,900                  |
| Avoided Water Cost                    | = | \$1,700                  |
| Tracking Account                      | = | positive balance         |
| Non-Administrative Real Estate Charge | = | \$0                      |
| Purchase Price                        | = | \$1,700* + \$0 = \$1,700 |

\*The \$200 difference between Base Price and Avoided Water Cost results in an addition to the Tracking Account as follows:

Total additions to the Tracking Account for the month = Acre-feet of water sold x \$200

---

**Example 2: Avoided Cost > Base Price, with a positive balance in the Tracking Account**

|                                       |   |  |
|---------------------------------------|---|--|
| Base Price                            | = | \$2,000  |
| Avoided Water Cost                    | = | \$2,100  |
| Tracking Account                      | = | positive balance (assume the balance is at least > (\$100 x acre-feet of water sold in the month)) |
| Non-Administrative Real Estate Charge | = | \$0  |
| Purchase Price                        | = | \$2,100* + \$0 = \$2,100   |

\*The -\$100 difference between Base Price and Avoided Water Cost results in a deduction from the Tracking Account as follows:

Total deductions from the Tracking Account for the month = Acre-feet of water sold x -\$100

---

**Example 3: Avoided Cost > Base Price, with a \$0 balance in the Tracking Account (it has been retired)**

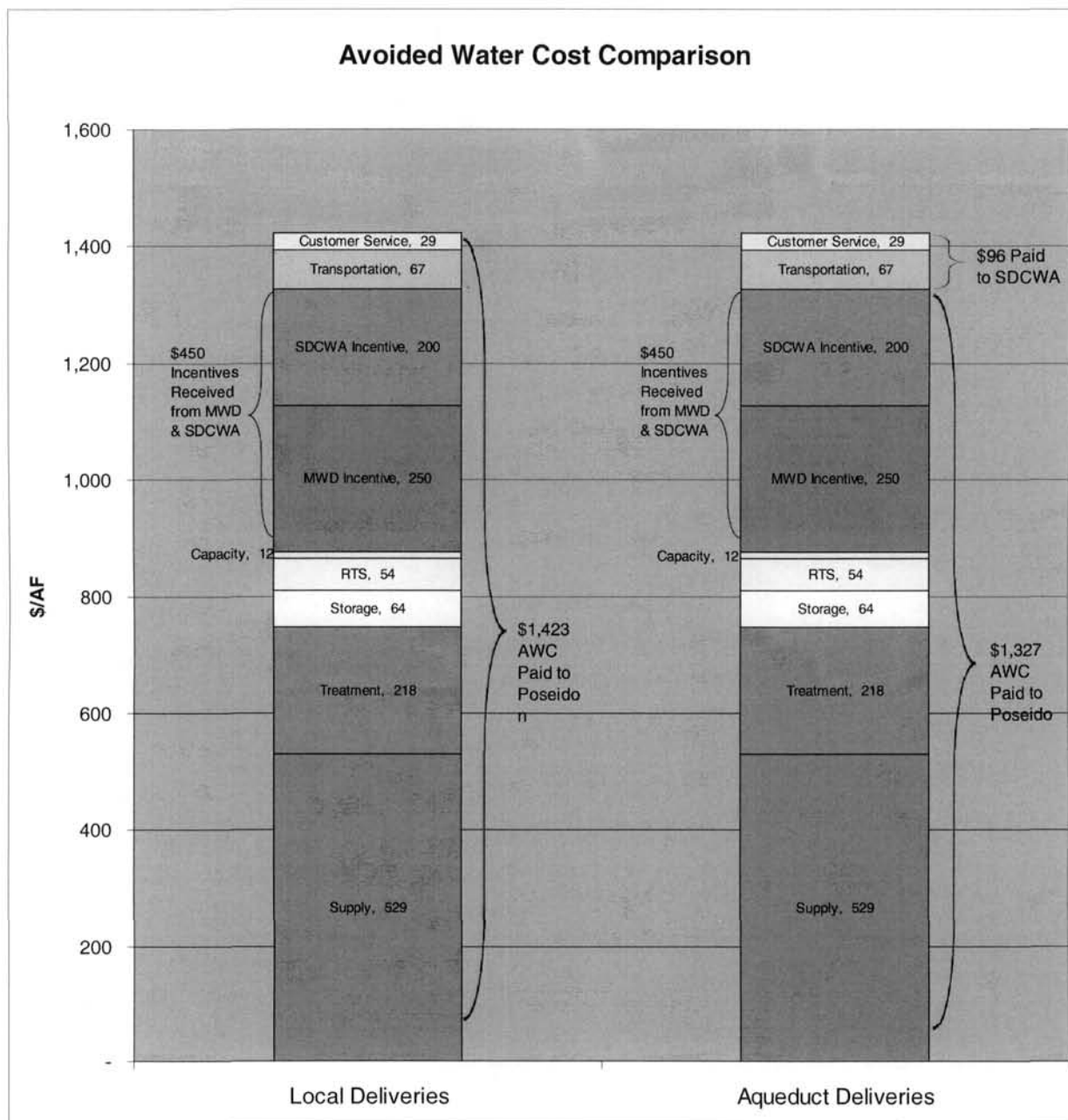
|                                       |   |                             |
|---------------------------------------|---|-----------------------------|
| Base Price                            | = | \$2,100                     |
| Avoided Water Cost                    | = | \$2,300                     |
| Tracking Account                      | = | \$0                         |
| Additional Payment                    | = | \$100*                      |
| Non-Administrative Real estate Charge | = | \$0                         |
| Purchase Price                        | = | \$2,100 + \$0 = \$2,100     |
| Total Payment                         | = | \$2,100 + \$100** = \$2,200 |

\*The Additional Payment is equal to 50% of the difference of Avoided Cost less Base Price, assuming the Tracking Account balance is zero. Thus, Additional Payment = (0.5 x (\$2,300 - \$2,100)) = \$100.

\*\*Since the Tracking Account balance is zero, the Total Payment is equal to the Purchase Price (\$2,100) plus the Additional Payment (\$100).

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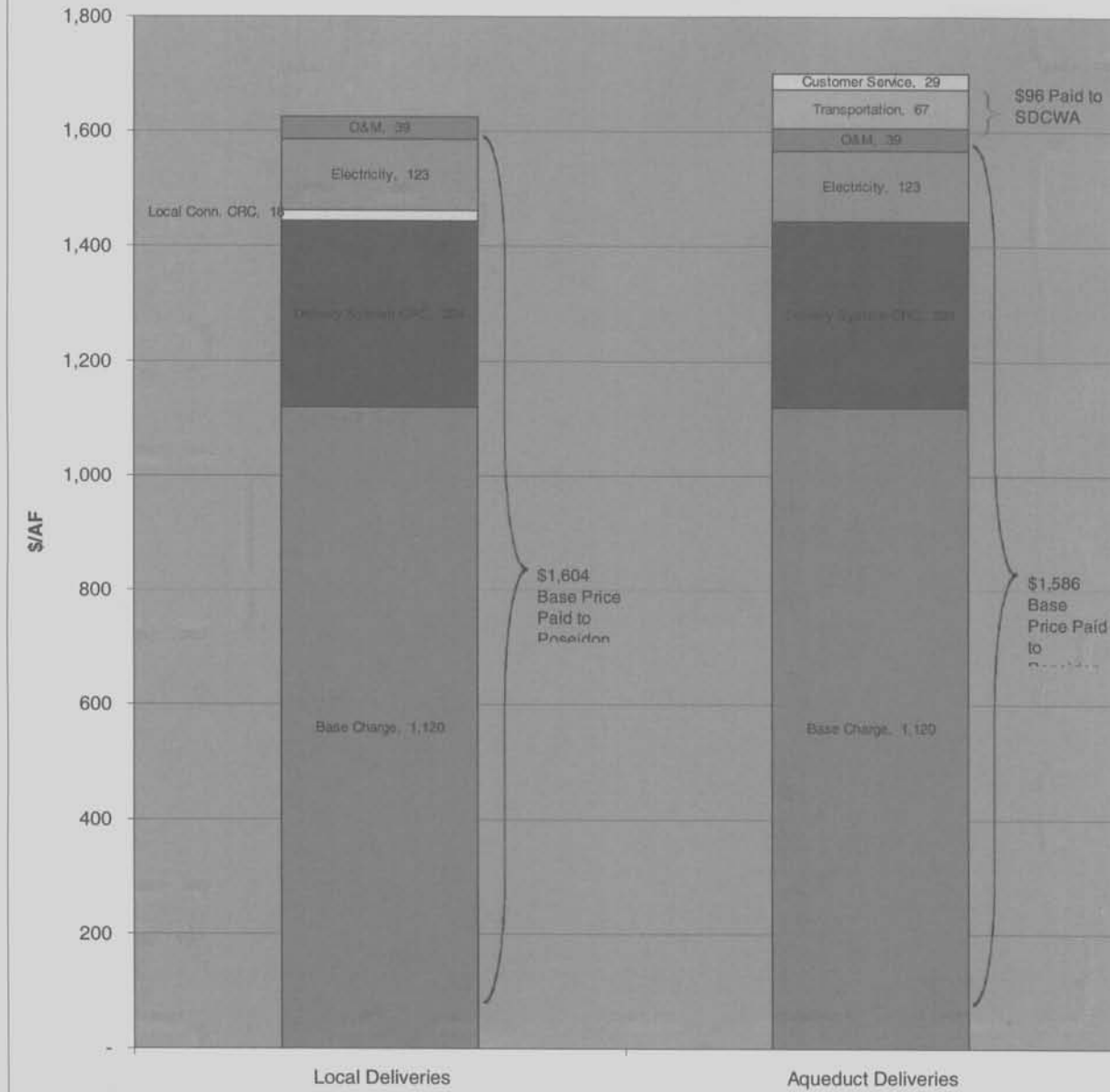
**8. Sample Illustration.** Solely for illustrative purposes, comparisons of the each of the Avoided Water Cost and the Base Price for local and aqueduct deliveries are set forth below:



100



# Base Price Comparison



**Attachment A**  
**To Schedule 3**  
**Allocated Cost Items**

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**Schedule 4.2**  
**Performance Test**

**PERFORMANCE TEST**

The purpose of the Performance Test is to establish how the Project performance compares to the expected performance levels and at the same time to ensure that the Project is in compliance with all Applicable Laws and Legal Entitlements.

**Performance Testing Requirements**

The Performance Test shall be in compliance with all Applicable Laws and Legal Entitlements, including the requirements of the California Department of Health Services. Samples for analysis shall be analyzed by state-certified laboratories.

The Performance Test is intended to verify the performance of the Project in terms of Product Water quality and quantity.

To successfully complete the Performance Test, the contractor under the engineering, procurement and construction contract for the Project ("Contractor") is required to:

1. Operate the entire Project over a period of 30 consecutive days (the "Test Period").
2. Determine the amount of Product Water meeting the Quality Standards produced during the thirty consecutive days of the Performance Test as compared to the expected 1,533,000,000 gallons of Product Water to be produced during the Performance Test.
3. Provide Poseidon with reasonably sufficient confirmation that the Performance Test was conducted in a manner that did not adversely affect any warranty under a major subcontract.

**General Information**

To accomplish a successful Performance Test, Contractor shall demonstrate the operation of the following essential process systems:

1. Seawater Intake System
2. Pretreatment System
3. Reverse Osmosis/ Energy Recovery/ Concentrate Discharge System
4. Post-treatment System
5. Product Water Storage and Pumping System
6. Waste Filter Backwash Treatment System

7. Membrane Clean in-place System
8. Chemical Storage and Delivery Systems
9. Solids Handling System
10. Laboratory Testing Processes

## **PERFORMANCE TEST DATA COLLECTION AND PERFORMANCE REQUIREMENTS**

A Project operation log sheet and report prepared specifically for this project, and approved by Poseidon before the initiation of the Performance Test shall be maintained each day. For the duration of the commissioning period, a daily log of all Project operating data, flows and conditions and a record of the performance of each item of equipment being monitored will be maintained by Contractor. Readings taken from the Project operations interface console shall be verified by readings taken from process-mounted instruments and manually collected samples, where applicable. All settings and set points will be recorded along with the results of all monitored criteria and samples tested. All Performance Test data collection locations, frequency, accuracy, measurement conditions, detection levels and format of presentation and reporting and recordkeeping shall satisfy all Applicable Laws and Legal Entitlements and subcontractor and equipment vendor warranties.

### **Project Shutdown During a Performance Test**

Any failures, stoppages or interruption of the Project that occur during a Performance Test shall not excuse Contractor from complying with the Performance Test requirements; provided, however:

1. For any period or periods during which the intake water does not meet the specifications in Poseidon's engineering procurement and construction contract, this period will not be allowed to count against the Test Period and the overall duration of the Performance Test will be increased to a total period (in hours) equal to the aggregate time during which such intake water did not meet such specifications.
2. If a Force Majeure event occurs which materially and adversely affects the operation of the Project during a Performance Test (except for the failure of the intake water to meet the specifications per (1) above), Poseidon shall either:
  - a. Grant Contractor an hour-for-hour extension of the Test Period for the duration for the Force Majeure event and such period will not be allowed to count against the overall duration of the Performance Test; or
  - b. Instruct Contractor to re-start the Performance Test from its beginning.

During an interruption of a Performance Test pursuant to Sections 1 or 2(a) above, Contractor may

only take action to maintain the Project in the state in which it would have been had the interruption not occurred, and shall not otherwise maintain, clean or take any other action with respect to the Project.

Prior to re-start of the Performance Test from the beginning, Contractor has the right to clean the affected Project equipment, pipes and structures and to remove fouling which may have resulted from equipment failure and/or abnormal stoppage, re-synchronize or equalization of the system.

## **PERFORMANCE TESTING REPORT**

Within fifteen days after completion of the Performance Test, Contractor will prepare five copies and submit in Adobe™ electronic format, indexed and fully-searchable, the draft Performance Testing Report.

### **Minimum Content of Performance Test Report**

A Performance Test Report shall be prepared by Contractor at the completion of the test period and provided to Poseidon. The test report shall include the data gathered and recorded during the Performance Test.

1. Contractor will prepare a table of results showing the actual performance achieved for the following:
  - a. The total Project power consumption, as determined from kilowatt hour readings from a General Electric PQM monitors (or equal) located in the main switchgear;
  - b. Chemical consumption;
  - c. Membrane operating data, and the normalized data in graphical format.
2. A membrane manufacturer's affidavit, stating that he has reviewed all of the operating data for the complete Project, is satisfied with the operation of the pre-treatment facilities and the quality of the RO feed water, and stating that in his opinion, the acceptance test results are valid;
3. Data Collection/Reporting Requirements and Process and Equipment Performance Requirements in tabular format, for:
  - a. Seawater Intake System;
  - b. Pretreatment System;
  - c. Reverse Osmosis System;
  - d. Post-Treatment System;

- e. Product Water and Transmission System;
  - f. Waste Filter Backwash Treatment System and Solids Handling System;
  - g. Chemical Storage and Delivery Systems.
- 4. Abortive Test – cause(s) and resolutions;
  - 5. Shutdowns due to minor failure – cause(s) and resolutions;
  - 6. Shutdowns beyond the control of Contractor – cause(s) and resolutions.

**Schedule 5**  
**Discretionary Legal Entitlements**

- California Regional Water Quality Board Order No. R9-2009-0038 Amending Order No. R9-2006-0065 (NPDES Permit No. CA0109223)
- Coastal Development Permit No. E-06-013
- City of Carlsbad Redevelopment Permit RP 05-12(A)
- City of Carlsbad Habitat Management Plan Permit #05-08(A)
- City of Carlsbad Precise Development Plan #00-02(B)
- California Department of Public Health Domestic Water Supply Permit
- City of Carlsbad Final Environmental Impact Report 03-05(A)
- Development Agreement 05-01(A)
- Specific Plan 144(J)

**Schedule 6.2**  
**Operations and Maintenance Contractors**

Acciona Agua and affiliates  
Ambient Technologies and Affiliates  
American States Water and affiliates  
American Water Enterprises and affiliates  
Befesa Abengoa and affiliates  
Carlsbad Municipal Water District  
CDM and affiliates  
CH2M Hill and affiliates  
General Electric Company and affiliates  
Metropolitan Water District of Southern California  
Orange County Water Authority  
San Diego County Water Authority  
United Water and affiliates  
Veolia Water and affiliates



**Schedule 8.2 - Quality Standards**  
**[Subject to review and approval by Authority]**

**Schedule 8.2 - Quality Standards**

| Quality Parameter <sup>10</sup>             | Analytical Method <sup>1</sup> | <u>Sampling</u>                         |                            |   | <u>Sampling Units</u> | Concentration Limits                                    |                           |                            |
|---|--------------------------------|---|----------------------------|---|-----------------------|---|---------------------------|----------------------------|
|   |                                | <u>Sampling Location<sup>10</sup></u>   | Sample period <sup>2</sup> | Sample Frequency/Method   | Units                 | Central Tendency <sup>3</sup>                           | Extreme <sup>4</sup>      | <u>Maximum<sup>5</sup></u> |
| Total Dissolved Solids                      | 2540 C                         | <u>Desalination Plant</u>               | one year                   | Weekly grab   | mg/L                  | 350   | 400                       | <u>600</u>                 |
| Chloride                                    | 4110 B                         | <u>Desalination Plant</u>               | one year                   | Weekly grab   | mg/L                  | 180   | 210                       |                            |
| Bromide                                     | 4110 B                         | <u>Desalination Plant</u>               | one year                   | Weekly grab   | mg/L                  | 0.5   | 0.8                       |                            |
| Boron                                       | 3120 B                         | <u>Desalination Plant</u>               | one year                   | Weekly grab   | mg/L                  | <del>1.0</del> <sup>5</sup> 0.75                        | <sup>5</sup> 1.0          |                            |
| Turbidity                                   | 2130 B                         | <u>Desalination Plant</u>               | one month                  | Continuous <sup>6</sup>   | NTU                   | 0.3   | 0.5                       | <u>5.0</u>                 |
| SDS-THM <sup>9,16</sup>                     | 5710 C                         | <u>Location Designated by Authority</u> | one year                   | Monthly Grab: 100% Desal  | mgug/L                | ≥70% of maximum contaminant level ("MCL" <sup>7</sup> ) | ≤100% of MCL <sup>7</sup> |                            |
| SDS-THM <sup>8,9</sup>                      | 5710EPA D524.2                 | <u>Location Designated by Authority</u> | one year                   | Monthly Grab: 50% desal & 50% Aqueduct blend of Product Water and Authority water | mgug/L                | ≥70% of MCL <sup>7</sup>                                | ≤100% of MCL <sup>7</sup> |                            |
| SDS-HAA <sup>9,16</sup>                     | 5710 D                         | <u>Location Designated by Authority</u> | one year                   | Monthly Grab: 100% Desal  | mgug/L                | ≥70% of MCL <sup>7</sup>                                | ≤100% of MCL <sup>7</sup> |                            |
| SDS-HAA <sup>8,9</sup>                      | 5710EPA D524.2                 | <u>Location Designated by Authority</u> | one year                   | Monthly Grab: 50% desal & 50% Aqueduct blend of Product Water and Authority water | mgug/L                | ≥70% of MCL <sup>7</sup>                                | ≤100% of MCL <sup>7</sup> |                            |
| Temperature                                 | 2550                           | <u>Location Designated by Authority</u> | one month                  | daily grab  | °F                    | -   | 85 °F                     |                            |
| <u>Total Coliform Bacteria<sup>11</sup></u> |                                | <u>Desalination Plant</u>               | <u>Each Sample</u>         | <u>Daily Grab</u>   | <u>MPN/100 mL</u>     | <u>Non-detect ("ND")</u>                                | <u>ND</u>                 | <u>ND</u>                  |

|  |  |   |                    |   |                                 |   |                               |                  |
|--|--|---|--------------------|---|---------------------------------|---|-------------------------------|------------------|
| <u>E. Coli Bacteria</u> <sup>11</sup>                                |  | <u>Desalination Plant</u>               | <u>Each Sample</u> | <u>Daily Grab</u>   | <u>MPN/100 mL</u>               | <u>ND</u>   | <u>ND</u>                     | <u>ND</u>        |
| <u>Total Chlorine Residual</u>                                       |  | <u>Location Designated by Authority</u> | <u>One Day</u>     | <u>Every 15 Minutes</u>   | <u>mg/L as Cl<sub>2</sub></u>   | <u>Authority Target Residual greater than 1.5 mg/L and less than or equal to 4.0 mg/L</u> <sup>12</sup> | <u>Authority Target ± 0.3</u> |                  |
| <u>Chlorine/Ammonia Ratio</u>  |  | <u>Location Designated by Authority</u> | <u>One Day</u>     | <u>Daily</u>  |                                 | <u>Authority Target Ratio between 4.5 and 5 parts chlorine to one part ammonia</u> <sup>12</sup>        | <u>Authority Ratio ± 0.3</u>  |                  |
| <u>Weekly Average Chlorine/Ammonia Ratio</u>                         |  | <u>Location Designated by Authority</u> | <u>Weekly</u>      | <u>Daily</u>  |                                 | <u>Authority Target Ratio between 4.5 and 5 parts chlorine to one part ammonia</u> <sup>12</sup>        | <u>Authority Ratio ± 0.3</u>  |                  |
| <u>pH</u>  |  | <u>Location Designated by Authority</u> | <u>Daily</u>       | <u>Every 4 Hours</u> <sup>13</sup>  |                                 | <u>8.5</u>  | <u>8.5 ± 0.2</u>              | <u>8.5 ± 0.5</u> |
| <u>Monthly Average pH</u>  |  | <u>Location Designated by Authority</u> | <u>Monthly</u>     | <u>Every 4 Hours</u> <sup>13</sup>  |                                 | <u>8.5</u>  | <u>8.5 ± 0.2</u>              | <u>8.5 ± 0.5</u> |
| <u>Calcium</u>   |  | <u>Desalination Plant</u>               | <u>One Year</u>    | <u>Daily Grab first 30 days of commercial operations, weekly thereafter</u> | <u>mg/L as CaCO<sub>3</sub></u> |   | <u>≥40</u>                    |                  |
| <u>Carbonate Alkalinity</u>  |  | <u>Desalination Plant</u>               | <u>One Year</u>    | <u>Weekly Grab</u>  | <u>mg/L as CaCO<sub>3</sub></u> |   | <u>≥45</u>                    |                  |
| <u>Langelier Saturation Index (LSI)</u>                              |  | <u>Desalination Plant</u>               | <u>One Year</u>    | <u>Weekly Grab</u>  |                                 |   | <u>≥0</u>                     | <u>&lt;1</u>     |
| <u>Calcium Carbonate Precipitation Potential (CCCP)</u>              |  | <u>Desalination Plant</u>               | <u>One Year</u>    | <u>Weekly Grab</u>  |                                 |   | <u>≥0</u>                     | <u>&lt;10</u>    |
| <u>Monthly Average Fluoride</u> <sup>14</sup>                        |  | <u>Desalination Plant</u>               | <u>Monthly</u>     | <u>Daily Grab</u>   | <u>mg/L</u>                     | <u>Authority Target between 0.0 and 0.9 mg/L</u> <sup>12</sup>  | <u>Authority Target ± 0.1</u> |                  |
| <u>Monthly Average Iron</u>  |  | <u>Desalination Plant</u>               | <u>Monthly</u>     | <u>Weekly Grab</u>  | <u>mg/L</u>                     |   |                               | <u>0.07</u>      |
| <u>Average Manganese</u>   |  | <u>Desalination Plant</u>               | <u>One Year</u>    | <u>Monthly Grab</u>   | <u>mg/L</u>                     |   |                               | <u>0.02</u>      |
| <u>Lead</u> <sup>15</sup>  |  | <u>Location Designated by Authority</u> | <u>One Year</u>    | <u>Six (6) Month Average</u>  | <u>ug/L</u>                     |   | <u>MCL</u>                    |                  |
| <u>Copper</u> <sup>15</sup>  |  | <u>Location Designated by Authority</u> | <u>One Year</u>    | <u>Six (6) Month Average</u>  | <u>mg/L</u>                     |   | <u>MCL</u>                    |                  |
| <u>Aluminum</u><br>(If aluminum salts are used in treatment process) |  | <u>Desalination Plant</u>               | <u>Monthly</u>     | <u>Weekly Grab</u>  | <u>mg/L</u>                     |   |                               | <u>0.20</u>      |

1. All methods taken from *Standard Methods On Line*, published by APHA, AWWA, and WEF or current EPA methods.
2. Sample period - concentration limits are calculated for this period
3. Central Tendency - can be exceeded in no more than 50% of samples taken
4. Extreme - can be exceeded in no more than 10% of samples taken (5% for boron)
5. ~~Permanent values to~~ Maximum – cannot be determined pursuant to Section 8.3. exceeded
6. Continuous analysis, values at 15 minute intervals used in all calculations
7. ~~Use the MCL that applies in~~ The Product Water will be deemed to be in compliance with the District's Distribution system concentration limit if the TTHM or HAA5 concentrations in the Aqueduct water exceed the concentration limit and the Product Water is not a contributing factor to the blend of Product Water and Authority water exceeding the concentration limit.
8. Does not apply if the ~~District Buyer~~ is using exclusively Desalinated Water
9. After the first year of testing, frequency of testing shall be per Applicable Law.
10. ~~All samples~~ Samples to assess compliance with Applicable Law and Schedule 8.2 (except for samples for ~~SDS THM~~ TTHM and ~~SDS HAA5~~ analyses) are to be collected at mutually agreed upon location at the Project site. All ~~SDS TMM~~ TTHM at: (a) at the desalination plant between the Pump Station and the boundary of the Site; or (b) the location Designated by Authority. The TTHM and ~~SDS HAA5~~ samples are to be collected at mutually agreed upon locations in the District's distribution system, as required by Applicable Law: a location designated by the Authority within its delivery system that is likely to receive a blend of Product Water and Authority water.
11. Replicate and replacement sampling protocols apply per CA Title 22 before a finding of non-compliance applies.
12. Although the Water Authority expects to make infrequent requests for a change to the Water Authority-Specified Level for this parameter, the Water Authority may specify a change to this value within the specified range no more frequently than daily.
13. Continuous analysis, values at four (4) hour intervals used in all calculations.
14. For fluoride values, the Water Authority intends to specify a fluoride residual based on Metropolitan's fluoridation practices and at a level considered optimum based on regulatory guidance. The Water Authority may specify a change to this value within the specified range no more frequently than daily.
15. Reduced monitoring per CA Title 22 shall apply if applicable. Compliance with California lead and copper regulations (Title 22, Chapter 17.5) at the point of connection to the Water Authority system.
16. Simulated Distribution System (SDS) tests will be used to determine compliance with THM and HAA requirements for the samples collected at the compliance point. Standard TTHM and HAA5 analyses will be used for distribution system samples. Treated Water is to be collected for the SDS tests and held in a water bath. The following describes the test conditions:

|   |  |
|---|--|
| pH:   | <u>No adjustment to collected sample</u>                                 |
| Temperature:                                | <u>Same as Treated Water at time of collection <math>\pm</math> 3 °C</u> |
| Total Cl <sub>2</sub> residual at test end: | <u>No adjustment to collected sample</u>                                 |
| Time:                                       | <u>48 <math>\pm</math> 2 hours</u>                                       |

Sampling must be conducted daily during the first 30 days in which Treated Water is received.

Examples of interpreting the central tendency and the extreme:

a. TDS - Central tendency requirement: no more than 26 samples among any 52 contiguous weekly samples may exceed 350 mg/L.

b TDS – Extreme: no more than 5 samples among any 52 contiguous weekly samples may exceed 400 mg/L.

c. Turbidity - central tendency requirement: no more than 1440 measurements among 2880 contiguous measurements recorded at 15 minute intervals may exceed 0.3 ntu.

d. Turbidity - extreme requirement: no more than 288 measurements among 2880 contiguous measurements recorded at 15 minute intervals may exceed 0.5 ntu.

e. ~~SDS THM~~TTHM - Central tendency requirement: no more than 6 samples among any 12 contiguous samples may exceed the MCL for ~~THMs~~ TTHM which is applicable to the water in the District's distribution system at the time the samples are taken.

**Schedule 9.2.1**  
**Delivery Points**  
**Appurtenant Facilities**  
**Additional Facilities**

**[to come]**

## **Schedule 12**

### **Insurance**

1. A combination of general and excess liability insurance with a limit of no less than \$50,000,000.00 per occurrence).
2. Automobile liability insurance at least as broad as Insurance Services Office form number CA 0001 (Ed. 1/87) covering Automobile Liability Code 1 (any auto) with a limit of no less than \$5,000,000.00 per accident.
3. Workers' compensation insurance as required by the State of California and Employer's Liability Insurance with an employer's liability limit of \$1,000,000.00 per accident for bodily injury and disease.
4. Builder's risk insurance on an all risk basis with a limit of liability no less than the price of Poseidon's engineering, procurement and construction contract.
5. Property insurance equal to the replacement value of the Project.

Deductibles of \$100,000.00 or more or self-insured retentions must be declared to and approved by the District.

Exhibit 13.2.9**Schedule 22.2.4A**

FORM OF OPINION OF COUNSEL TO

THE FOLLOWING POINTS TO BE ADDRESSED:

1. The District is a municipal water district duly organized, validly existing and in good standing under the laws of the State of California and has full \_\_\_\_\_ power and authority to transact the business in which it is engaged and to execute, deliver and perform its obligations under the Amended and Restated Water Purchase Agreement, dated as of \_\_\_\_\_, 2010, between Poseidon Resources (Channelside) LLC and the District and any other agreement related to the transaction to which the District is a party (the "Documents").

2. The Documents have been duly authorized by all necessary actions on the part of the District and have been duly executed and delivered by duly authorized officers of the District, and the Documents constitute the legal, valid and binding obligations of the District enforceable against it in accordance with their respective terms.

3. No additional or further approval, consent or authorization of any state or local governmental or public agency or authority, not already obtained, is required to be obtained by the District in connection with entering into the Documents or performing its obligations thereunder.

4. Neither the execution, delivery and performance of the Documents nor the consummation of the transactions contemplated thereby by the District, will (a) violate any federal or state statute or any provision thereof or any rule or regulation applicable to the District or (b) result in a breach of any of the terms, conditions or provisions of any order, judgment, decree or ruling of any court, arbitrator or federal authority that is applicable to the District (c) violate or result in a breach of any agreement or instrument to which the District is a party or by which the District or any of its principal properties are bound or (d) violate the **[relevant organizational documents and by-laws]** of the District.

5. Except as set forth in Schedule 2.3.4 of the Agreement, no litigation or proceeding of or before any United States federal or California court or governmental authority is pending or threatened against the District that challenges the validity of the Documents.

Schedule 22.2.4B

FORM OF  
CERTIFICATE OF REPRESENTATIONS AND WARRANTIES  
AND ACKNOWLEDGMENT

A. The Carlsbad Municipal Water District ("Buyer") and Poseidon Resources (Channelside) LLC ("Poseidon") have entered into that certain Amended and Restated Water Purchase Agreement, dated as of \_\_\_\_\_, 2010 (the "Agreement") pursuant to which Poseidon will sell and Buyer will buy desalinated water from the Project (as defined in the Agreement). Each capitalized term used and not defined in this Certificate has the meaning given to it in the Agreement.

B. Poseidon intends to construct and operate the Project on the Leased Property and finance a portion of the costs of construction with the proceeds of [debt obligations to be described].

C. The \_\_\_\_\_, acting in the capacity of \_\_\_\_\_, under a \_\_\_\_\_, will hold the collateral securing the [debt obligations to be described] and Poseidon's obligations, if any, to the other Senior Creditors.

D. The execution of this Certificate is a condition precedent to the issuance of the [debt obligations to be described].

NOW, THEREFORE, in consideration of the foregoing:

1 \_\_\_\_\_ Representations and Warranties. Buyer represents and warrants to the [Collateral Agent and the Trustee], as of the date of this Certificate:

(a) Organization; Power and Authority. Buyer is a municipal water district organized and existing under the laws of the State of California, and has the power and authority to transact the business it transacts and proposes to transact, to execute this Certificate and the Agreement and to perform its obligations thereunder.

(b) Authorizations, Enforceability. This Certificate and the Agreement have been duly authorized, executed and delivered by Buyer and do not require any permits, approvals, filings with, or consents of any entity or person (including any Governmental Authority) that have not previously been obtained or made. The Agreement constitutes a legal, valid and binding obligation of Buyer enforceable against Buyer in accordance with its terms, except as such enforceability may be limited by (a) applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the enforcement of creditors' rights generally and (b) general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law).

(c) No Default or Force Majeure. There exists no Poseidon Event of Default or District Event of Default and, to the best of Buyer's current and actual knowledge, there



exists no Poseidon Default. To the best of Buyer's current and actual knowledge, no Force Majeure exists under the Agreement.

(d) No Adverse Proceedings. Except as set forth on Schedule 2.3.4 to the Agreement, there is no litigation, action, suit, proceeding or investigation pending or (to Buyer's current and actual knowledge) threatened against Buyer before or by any court, administrative agency, arbitrator or governmental authority, body or agency that, if adversely determined, individually or in the aggregate, (a) could materially adversely affect the performance by Buyer of its obligations under the Agreement or that could modify or otherwise adversely affect any required approvals, filings or consents that have previously been obtained or made, (b) could have a material adverse effect on the condition (financial or otherwise), business or operations of Buyer or (c) questions the validity, binding effect or enforceability of the Agreement, any action taken or to be taken pursuant hereto or thereto or any of the transactions contemplated thereby.

(e) No Violations. The execution, delivery and performance by Buyer of this Certificate and the Agreement, and the consummation of the transactions contemplated thereby, will not result in any violation of, breach of or default under any term of its formation or governance documents, or of any contract or agreement to which it is a party or by which it or its property is bound, or of any license, permit, franchise, judgment, injunction, order, law, rule or regulation applicable to it, other than any such violation, breach or default could not reasonably be expected to have a material adverse effect on the rights and benefits of Poseidon or Buyer's ability to perform its obligations, under, in respect of, or in connection with, the Agreement.

(f) No Other Agreements. The Agreement is the only agreement between Poseidon and Buyer with respect to the Project and the only agreement entered into by Buyer in connection with the Project.

Each of the foregoing representations and warranties will survive the execution and delivery of this Certificate and the consummation of the transactions contemplated by the Agreement.

2. Acknowledgment. Buyer acknowledges that the **[Collateral Agent]** is the initial Secured Party and is entitled to all the rights and remedies of the Secured Party under Article 22 of the Agreement.

IN WITNESS WHEREOF, Buyer has caused this Certificate of Representations and Warranties and Acknowledgment to be duly executed by its duly authorized representative as of the date first set forth above.

Carlsbad Municipal Water District,  
a municipal water district

Development Agreement Term Sheet

By: \_\_\_\_\_  
Name  
Title

Schedule 22.7.4

Form of Substitute Accession Agreement

[Date]

To: Carlsbad Municipal Water District  
For the attention of: [ ]

[Senior Creditors and other parties to  
Financing Agreements to be listed]  
[insert address]  
For the attention of: [ ]

From: [Substituted Entity]

~~TERM SHEET FOR DEVELOPMENTS~~SUBSTITUTE ACCESSION AGREEMENT

Ladies and Gentlemen:

Reference is made to the Amended and Restated Water Purchase Agreement, dated as of  
, 2010 (the "Agreement"), between Poseidon Resources (Channelside) LLC  
("Poseidon") and the Carlsbad Municipal Water District ("Buyer").

1. We hereby confirm that we are a Substituted Entity pursuant to Section 22.7 of the  
Agreement.

2. We acknowledge and agree that, upon and by reason of our execution of this  
Substitute Accession Agreement, we will become a party to the Agreement as a Substituted Entity  
and, accordingly, shall have all of the rights, powers and obligations of Poseidon under the  
Agreement.

3. Our address for the purpose of receiving notices is as follows:

[contact details of Substituted Entity]

4. This Substitute Accession Agreement shall be governed by, and construed in accordance with, the law of the State of California.

The terms set forth herein are hereby agreed to:

*[Substituted Entity]*

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Agreed for and on behalf of:

**BETWEEN THE CITY OF CARLSBAD  
MUNICIPAL WATER DISTRICT**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**AND POSEIDON RESOURCES (CHANNELSIDE) LLC**

|                       |   |
|-----------------------|---|
| Project               | <del>Reverse osmosis seawater desalination plant (the "Project"). The Project will be located at a site adjacent to the Encina Power Station in the City of Carlsbad (the "City").</del>  |
| Parties               | <del>The City of Carlsbad, the Carlsbad Municipal Water District (the "District"), the Carlsbad Housing and Redevelopment Commission (the "RDA") and Poseidon Resources (Channelside), LLC ("Poseidon").</del>  |
| Purpose of Term Sheet | <del>This Term Sheet is intended to provide a basis for the negotiation of a comprehensive development agreement ("Agreement") and should not be construed as all inclusive. Further, this Term Sheet represents the intentions of the parties as of the date it is executed. Poseidon recognizes that the Agreement is subject to public review and approval by the Carlsbad City Council and the California Coastal Commission (the "Coastal Commission"). Poseidon recognizes that the Agreement is subject to the California Environmental Quality Act.</del> |

**PRINCIPAL TERMS**

|   |  |
|---|--|
| Vesting   | The Agreement vests or “freezes in place” the General Plan, zoning, and PDP if they are approved concurrently for the Poseidon site. Any future permit or approval shall be governed solely by laws, ordinances and regulations of the City in effect at the time the Agreement is adopted.  |
| Term  | The term shall be 40 years from the date the Agreement is effective, which is when it is approved by the Coastal Commission, or the ordinance adopting the Agreement becomes effective, whichever is the later event.  |
| Runs with the Leasehold   | The Agreement shall be recorded and run with the leasehold interest, and its obligations shall bind any successors in interest who assume, use or occupy the Poseidon leasehold. Per Government Code Section 65868.5, the “burdens of the agreement shall be binding upon, and the benefits of the agreement shall inure to, all successors in interest to the parties to the agreement.”  |
| Payment of Taxes and Fee in Lieu of Taxes                                   | Poseidon and successors in interest shall pay a fee in lieu of taxes to the City equal to the property taxes that the City, the District and the RDA would receive from the construction and operation of a desalination facility on the Poseidon leasehold, such fee to be waived so long as the leaseholder pays property taxes due under state law for the use and occupancy of the leasehold, and does not claim a partial or full exemption from payment for such tax. Neither Poseidon nor its successors in interest shall contest the payment of (i) any property taxes validly imposed under applicable law or (ii) the fee in lieu of taxes described above. |
| Exemption from Any Future Special Water Production Tax or Franchise Fee     | The City agrees that for the term of the Agreement, so long as the City is paid the taxes, or fee in lieu of taxes described in the preceding section, it will not levy in a discriminatory manner against Poseidon any tax or fee. For example, it will not attempt to collect from Poseidon a franchise fee, tax, or other monetary charge levied only on businesses which produce or sell water, and if such fee, tax or charge is adopted by the City, Poseidon and its successors shall be exempt.  |
| Modification or Termination Per Code, Provisions for Mandated Annual Review | Per Government Code Section 65865.1, the City may terminate or modify the Agreement if it finds on the basis of substantial evidence that Poseidon or its successor in interest has not complied in good faith with its terms and conditions. Provisions for conduct of annual review required by Government Code Section 65865.1.   |
| Approval by Coastal   | Per Government Code Section 65869, because the Project is  |

|   |   |
|---|---|
| Commission  | located in an area which does not yet have an approved Local Coastal Program, the Coastal Commission must approve the Agreement. If the Environmental Impact Report is certified, the parties expect to apply for the approval of the Coastal Commission as soon as is practicable thereafter.  |
| Assignment  | The rights and obligations of the Agreement, upon written notice to the City, may be assigned and delegated by Poseidon in its discretion, in connection with a permitted assignment of the Water Purchase Agreement. If any entity acquires the leasehold by condemnation or involuntary sale, this Agreement and its rights and duties shall be assigned and delegated to the new acquiring entity and Poseidon shall have no further liability under the Agreement. Poseidon shall, at the request of the City, use reasonable efforts to have the City named as a party in any proceeding with respect to such a condemnation or involuntary sale. To the extent that Poseidon receives any condemnation award attributable to the right of the City to receive a payment in lieu of taxes under this Agreement, Poseidon shall pay the amount of such award to the City. |
| Financing of Public Improvements, Pipes and Rights of Way | The City shall have no obligation to use public financing, such as an assessment district or Mello Roos district, for financing of public improvements, such as roads, pipes, etc. The City, the District and the RDA shall provide, and shall cause any governmental agency under their control to provide any required public rights of way for the facilities to deliver Product Water to the District from the Project without charge.  |
| Environmental Compliance                                  | Poseidon shall pay all costs associated with environmental review and regulatory agency permitting. The City and Poseidon recognize that time is of the essence and will take all reasonable steps to complete environmental review and enter into the Agreement in a timely manner.  |
| Unable to Reach Agreement                                 | In the event that the parties are unable to establish terms and adopt the ordinance approving the Agreement within 12 months, this Term Sheet shall expire unless it is extended by mutual written consent.   |
| Signatures  | The City and Poseidon represent that this Term Sheet is an expression of current intent to negotiate, draft, establish terms of and execute the Agreement or agreements to implement the principals established in this Term Sheet. This Term Sheet shall not be construed as a contract. Each party shall bear its own costs incurred in implementing this Term Sheet.   |



Document comparison done by Workshare DeltaView on Tuesday, May 04, 2010 2:40:47 PM

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| Document 2    | file://C:/Documents and Settings/gbk1/My Documents/DSMDB-#2719744-v11-Poseidon_Carlsbad_A&R_Water_Purchase_Agreement.DOC |
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| Deletions      | 574   |
| Moved from     | 21    |
| Moved to       | 21    |
| Style change   | 0     |
| Format changed | 0     |
| Total changes  | 2109  |